

1994

The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions

Pamela H. Bucy

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The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions

Cover Page Footnote

Bainbridge Professor of Law, University of Alabama School of Law. The author expresses her appreciation to Dean Kenneth C. Randall and the Law School Foundation for their support and to Donald W. Baker, Alesia Darling, Donna Warnack and Richard Raleigh for their assistance. This article has been enriched by the comments and thoughts of Margaret A. Berger, George Thomas III and Sarah N. Welling. Any errors that remain are mine.

THE POOR FIT OF TRADITIONAL EVIDENTIARY DOCTRINE AND SOPHISTICATED CRIME: AN EMPIRICAL ANALYSIS OF HEALTH CARE FRAUD PROSECUTIONS

PAMELA H. BUCY*

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INTRODUCTION

Although indicted, tried, and sanctioned as criminal cases, white collar crime blurs the line between civil and criminal law.¹ Over the past two decades, substantial scholarship has focused on the hybrid nature of white collar crime.² Much of this scholarship has suggested that our system of justice has gone too far in blending criminal and civil law. According to this view, affixing criminal liability to unintentional conduct and to technical wrongs, rather than moral wrongs, harms the efficiency of the market³ and squanders the criminal law's power as a behavior-modifying force in society.⁴ This Article suggests that although our criminal justice system may have gone too far in blending criminal and civil law, in some respects it has not gone far enough. By failing to recognize the hybrid criminal/civil nature of

1. See Pamela H. Bucy, *White Collar Crime, Cases and Materials* 3 (1992) [hereinafter Bucy, *White Collar Crime*]; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 198-99 (1991); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1798 (1992).

2. See, e.g., Alan L. Adlestein, *A Corporation's Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. Davis L. Rev. 375, 387 (1994) (commenting on the similarity between the criminal prosecution of a corporation and the governmental regulation of the same corporation by punitive civil damages); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1099 (1991) (stating that historical and current standards of corporate criminal liability encourage blurring of criminal and civil liability) [hereinafter Bucy, *Corporate Ethos*].

3. Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423, 449 (1963).

4. Bucy, *Corporate Ethos*, *supra* note 2, at 1182-84.

white collar crime and continuing to process these cases through rules of criminal procedure and established doctrines of evidence, our criminal justice system regularly shortchanges the rights of both the government and defendants.

To explore this issue, this Article examines one type of white collar crime, health care fraud, by analyzing evidentiary and procedural issues in reported opinions of criminal prosecutions of fraud committed by health care providers. Part I reviews the 372 cases studied, highlighting evidentiary trends that are discussed in Parts II through VII. Parts II through V focus on four different types of evidence employed by prosecutors in proving health care fraud. Part II examines expert witness testimony: how it has evolved in health care fraud prosecutions; how prosecutors use government agents as expert witnesses; and how expert testimony could be used to a greater extent. Part III focuses on summary evidence and suggests that white collar criminal cases call into question accepted dogma about the admissibility of summary charts. Part III concludes with a suggested alternative analysis for courts to employ when considering the admissibility of summaries. Part IV examines extrinsic act evidence and how and why such evidence occupies a significant place in white collar criminal cases. Part V addresses the backbone of white collar cases, proof by documents, and focuses on three types of documentary evidence used extensively in health care fraud prosecutions: patient medical charts, provider manuals, and computer-generated evidence. Part V also reviews the hurdles each of these types of documents presents for the government and defense, and suggests procedural changes that should be made to better accommodate the unique problems presented by such evidence. Part VI focuses on searches as one particular method of obtaining evidence. This section highlights the unique legal issues white collar crime searches present because of their hybrid civil/criminal nature by addressing three issues: (1) particularity and overbreadth in search warrants; (2) use of administrative warrants in criminal investigations; and (3) private party searches. Part VII focuses on two privilege issues that permeate all of the evidentiary concerns discussed in this Article: Fifth Amendment and patient-provider. This section discusses the fact that these privileges exist to a lesser extent in health care fraud prosecutions than in other white collar criminal cases.

This examination of evidentiary issues leads to the following observations about health care fraud prosecutions, in particular, and white collar crime, in general. First, the growing complexity of crimes presents increasingly difficult evidentiary questions for litigants and courts. Second, the hybrid civil/criminal nature of white collar crime requires accommodations in evidentiary and procedural doctrines if justice is to be served. Third, neither prosecutors nor defense counsel have been as aggressive as they should be in protecting the rights of

their clients from outdated or inapplicable evidentiary doctrines. To pursue more aggressive evidentiary strategies, both prosecutors and defense counsel should become more fluent in the nuances of evidentiary jurisprudence. Finally, these first three observations combined raise the question of whether our system of criminal justice, designed for simple crimes provable by simple evidence, is the optimal vehicle for dealing with white collar crime and its inherent complexity. Suggesting that it is not, this Article concludes by recommending specific changes that should be made by courts and legislatures to better ensure that cases involving sophisticated crimes are tried fairly.

I. THE CASES STUDIED

The sample of cases examined for this Article consists of 372 state and federal criminal prosecutions of health care providers for fraud. These cases were identified through an extensive computer search.⁵ Although reported cases are not a complete collection of all cases litigated,⁶ reviewing reported cases is a helpful method for analyzing evidentiary issues. Reported cases reveal the issues that the courts and litigants struggle over and demonstrate how courts resolve them.⁷ Reported cases are also the only source available to conduct an in-depth study of certain types of cases, such as health care fraud prosecutions. Investigated by multiple state and federal agencies,⁸ prosecuted by

5. Pamela H. Bucy, *Fraud By Fright: White Collar Crime By Health Care Providers*, 67 N.C. L. Rev. 855, 882 n.204 (1989) [hereinafter Bucy, *Fraud By Fright*].

6. *Id.* at 882 n.207. It is unfortunate that the only mechanism readily available to study prosecutions of health care providers is through reported cases. This is an inadequate sample for two reasons. First, courts are reporting fewer and fewer of their opinions. Prior to 1971 most courts reported most of their opinions. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477, 478 (1988). In 1990, by comparison, almost 70% of decisions rendered by the federal courts of appeals were unpublished. Mitchell F. Dolan & Robert N. Sayler, *Twenty Years of Litigation*, A.B.A. Sec. Litig., 20 Litig. 6, 8 (1993). Second, significant cases are often settled. These two deficiencies in the sample make it difficult to detect trends, especially in an area changing as rapidly as health care.

7. Cf. Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 Loy. L.A. L. Rev. 893, 893-95 (1992) (demonstrating the insights that can be gained from an empirical study of reported cases by working with only a small sample).

8. The following federal agencies investigate health care fraud: Federal Bureau of Investigation, Department of Health and Human Services, Office of Inspector General, Civilian Health and Medical Program for the Uniformed Services (CHAMPUS), Veterans Administration, Railroad Retirement Board, Office of Personal Management, Food and Drug Administration, Department of Labor, and Postal Inspection Service. In addition, 44 states have Medicaid fraud control units, which are specialized units in each state's attorney general's office. See Bucy, *Fraud by Fright*, *supra* note 5, at 937 n.123; Alan E. Reider & Harvey A. Yampolsky, *Identifying and Coping with Health Care Fraud Investigations*, 40 Fed. B. News & J. 62, 63-64 (1993).

both federal and state officials⁹ who rely on many different statutes,¹⁰ and often settled out of court between the parties,¹¹ health care fraud prosecutions are not cataloged or collected by any one agency.

The first reported opinion of a prosecution of a health care provider for fraud was in 1909.¹² From 1909 through 1993 there have been 372 reported opinions of prosecutions of health care providers for health care fraud. My prior study examined the theories of fraud under which these providers had been prosecuted, concluding that despite the variety in prosecuting jurisdictions, statutory authorities employed, and types of providers prosecuted, all prosecutions of providers for health care fraud focused on eight types of fraud: (1) Prescription ("Rx") by Fraud; (2) Billing for Services Not Performed; (3) Misrepresenting the Nature of Services Provided; (4) Automobile Accident Scams; (5) Quackery; (6) Filing False Cost Reports; (7) Soliciting, Paying, or Receiving Illegal Remunerations; and (8) Providing and Billing for Unnecessary Services.¹³ This Article builds upon this prior analysis.

In the "Rx by Fraud" cases, providers commit fraud when they acquire a controlled substance by falsely alleging that it is for legitimate medical purposes, or "when they prescribe a controlled substance that is not for legitimate medical purposes."¹⁴ As shown in chart 1, *infra*, this is the most frequently prosecuted type of health care fraud, which may be due to its prevalence or simply to the fact that it is one of the easiest types of fraud to prove.¹⁵

"Billing for Services Not Provided" is also one of the easiest types of fraud to prove, but only when the services at issue are detectable by physical examination or are services a patient would recall if actually rendered.¹⁶ Examples of services typically billed that did not occur

9. Bucy, *Fraud By Fright*, *supra* note 5, at 883 (describing study of reported prosecutions of health care providers that revealed that 63% of all such prosecutions were by federal authorities and 37% were by state authorities).

10. *Id.* This same study showed that federal authorities prosecuted health care providers under 30 different statutes; state authorities used 20 different types of statutes.

11. Unreported cases account for some of the more significant health care fraud prosecutions. For example, one of the largest health care fraud prosecutions ever, National Health Laboratories, settled without a reported opinion. 7 Corporate Crime Rep. 3 (Jan. 4, 1993).

12. *Hibbard v. United States*, 172 F. 66 (7th Cir. 1909).

13. Bucy, *Fraud By Fright*, *supra* note 5, at 884.

14. *Id.* at 889.

15. *Id.* at 893.

16. *Id.*

include doctors visits,¹⁷ disbursements of medicines,¹⁸ and simple procedures,¹⁹ such as x-rays.

There are two general types of fraud prosecuted as "Misrepresenting the Nature of the Services Provided."²⁰ Each type highlights a different aspect of the "fee for service" method of reimbursement.²¹ "Fee for service" reimbursement pays a health care provider per service rendered. Often the fee is based upon the provider's reported cost in rendering the service.²² Under this method of payment, the more services performed and/or the greater the cost of the services that a provider can justify, the more the provider is reimbursed.²³ Within this scheme of reimbursement, insurers are compensated for some but not all services. This practice encourages the fraudulent provider to render noncompensable services while misrepresenting the services as compensable.²⁴ Examples of this type of fraud include a podiatrist who misrepresented to Medicare that he treated patients for complex and compensable podiatric ailments when he merely trimmed toenails,²⁵ and a physician who misrepresented that he provided compensable injections for joint pain but actually supplied non-compensable injections of routine vitamins or medicines.²⁶ Under the "fee for service" method of reimbursement, insurers also compensate more for some services than others.²⁷ This encourages the fraudulent

17. See, e.g., *United States v. Hilliard*, 752 F.2d 578, 579 (11th Cir. 1985) (finding that defendant submitted false Medicare claims and demanded payment for office visits, tests, and services that were not provided); *United States v. Mitlo*, 714 F.2d 294, 295 (3d Cir.) (involving a defendant charged with making false and fraudulent statements with respect to Medicaid claims and with mail fraud after he overreported the number of visits made by a particular patient), *cert. denied*, 464 U.S. 1018 (1983).

18. See, e.g., *United States v. Sanders*, 749 F.2d 195, 197 (5th Cir. 1984) (involving a pharmacist convicted for violations of federally controlled substance laws and for Medicare fraud by writing fictitious prescriptions never filled and making claims for reimbursement); *United States v. Ziperstein*, 601 F.2d 281, 285 (7th Cir. 1979) (involving defendants convicted of dispensing prescriptions at amounts lower than stated on the prescription form and then billing the state for the full amount), *cert. denied*, 444 U.S. 1031 (1980).

19. Cf. *People v. American Medical Ctrs., Ltd.*, 324 N.W.2d 782, 787 (Mich. Ct. App. 1982) (demonstrating how prosecution for this type of fraud is successful when the procedure at issue is intrusive and memorable for the patient, rather than simple), *cert. denied*, 464 U.S. 1009 (1983).

20. Bucy, *Fraud by Fright*, *supra* note 5, at 896.

21. *Id.*

22. For example, institutional providers such as hospitals and nursing homes are required to file annual reports setting forth their costs in treating patients. The amount these providers are reimbursed is calculated from these reports. See 42 U.S.C. § 1395g (1992); 42 C.F.R. § 413.20 (a) & (b) (1993). For example, a summary of the type of costs properly included in nursing home reports is contained at 1 Medicare & Medicaid Guide (CCH) ¶ 35,378, at 10,947-955 (1986).

23. Bucy, *Fraud By Fright*, *supra* note 5, at 861.

24. *Id.* at 896.

25. *United States v. Rousseau*, 534 F.2d 584, 585 (5th Cir. 1976).

26. *United States v. Mekjian*, 505 F.2d 1320, 1322-23 (5th Cir. 1975).

27. Bucy, *Fraud By Fright*, *supra* note 5, at 896.

provider who supplies a compensable service to bill for a more lucrative compensable service.²⁸ Examples of this type of fraud include a medical laboratory that billed for "manual" blood tests when "automated" blood tests were performed²⁹ and a nursing home administrator-owner who misrepresented the level of care given to patients.³⁰

The "Automobile Accident Scam" combines the "Services Not Provided" and "Misrepresenting the Nature of Services" theories.³¹ Because of the large number of these cases and the customized method employed by defendants to commit the fraud, the "Automobile Accident Scam" warrants separate treatment.³² Health care providers usually are only one of the defendants involved in these cases.³³ The frauds proceed in a similar manner: after a legitimate or staged automobile accident, false medical information is provided to generate false insurance claims.³⁴

The "Quackery" cases involve misrepresentations of medical credentials and of the prophylactic or curative value of products or treatment.³⁵ Most of the reported "Quackery" cases involve the latter type of misrepresentation and "are a testament to the ingenuity and gullibility of human beings."³⁶ Sample "Quackery" prosecutions include the defendant prosecuted for selling "oxypathors," a device that allegedly enhances the breathing through the "skin and membranes of the human body," thereby increasing "vital combustion" and circulation.³⁷ Another defendant was convicted on fraud charges for marketing "[a] wonder treatment" for "restor[ing] flagging vital forces" and "awaken[ing] [the] glands" of men in their 60s, 70s, and 80s.³⁸

28. *Id.* at 897.

29. *United States v. Precision Medical Labs., Inc.*, 593 F.2d 434, 438 (2d Cir. 1978).

30. *United States v. Huckaby*, 698 F.2d 915, 916 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

31. *Bucy, Fraud By Fright*, *supra* note 5, at 899.

32. *Id.*

33. *Id.* at 899-900.

34. *Id.* at 905. For example, in *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974), "recruiters" solicited "hitters" whose function was to drive the "hitter" automobile in each collision in this state-wide fraud. *Id.* at 55. Pregnant women were heavily recruited for the target automobiles because they "could claim pregnancy related injuries which would be both hard to disprove and easily settleable with the insurance carriers." *Id.*

35. *See Bucy, Fraud By Fright*, *supra* note 5, at 905.

36. *Id.* at 906. For example, the defendant in *Moses v. United States*, 221 F. 863 (2d Cir.), *cert. denied*, 238 U.S. 629 (1915), was convicted for advertising and selling "oxypathors," a device that allegedly "begets . . . a supplementary breathing through the skin and membranes of the human body." *Id.* at 866. The defendants in *Baker v. United States*, 115 F.2d 533 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941), were convicted for fraudulently representing that they had a treatment that could cure "piles, rupture, prostate, varicose veins and numerous other diseases and ailments." *Id.* at 537.

37. *See Moses*, 221 F. at 866.

38. *See Stunz v. United States*, 27 F.2d 575, 576 (8th Cir. 1928).

"Filing False Cost Reports" scenarios arise because the amount of reimbursement due some providers, such as nursing homes and hospitals, is based upon their reported costs, which these institutions submit in annual cost reports.³⁹ The reported cases reveal that some providers have committed fraud in several ways when reporting their costs: "(1) by including expenses not related to patient care; (2) by inflating expenses that are related to patient care; and (3) by failing to disclose the related status of business entities with whom the provider is dealing."⁴⁰ As seen in chart 1, *infra*, there have been relatively few reported prosecutions for fraudulent cost reporting.⁴¹ This may be because of the difficulty in prosecuting this type of fraud. In these cases, the accounting issues are complex, the pleading issues are difficult, and because of the number of people who contribute to the preparation of most cost reports, proving intent to defraud on the part of any one person is difficult.⁴²

"Soliciting, Paying, or Receiving Illegal Remunerations" cases have all been pursued as statutory violations because specific federal and state statutes make it a crime to receive, solicit, or pay kickbacks, bribes, rebates, or any remuneration for referring a patient or placing or recommending the placing of an order for any service or item.⁴³ The types of payments historically prosecuted as illegal remunerations include fees paid to physicians by medical laboratories to induce referrals of patient specimens⁴⁴ and payments to nursing home administrators to secure a place for a patient in the nursing home.⁴⁵ As can be seen in chart 1, *infra*,⁴⁶ this has also been one of the least prosecuted types of fraud, which is surprising because kickbacks are widely acknowledged to be a pervasive problem, especially within medical laboratories.⁴⁷ This infrequency of prosecutions may be due to the

39. See Bucy, *Fraud By Fright*, *supra* note 5, at 908-09.

40. *Id.* at 909.

41. See *infra* chart 1 & appendix I.

42. See Bucy, *Fraud by Fright*, *supra* note 5, at 911-14.

43. See *id.* at 914.

44. See *United States v. Lipkis*, 770 F.2d 1447, 1449 (9th Cir. 1985).

45. See *United States v. Zacher*, 586 F.2d 912, 913 (2d Cir. 1978).

46. See *infra* chart 1 & appendix I.

47. See *Kickbacks in Clinical Laboratories: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 5 (1982) (testimony of Charles P. Monroe, Assistant Director, Criminal Investigative Division, FBI). Assistant Director Monroe stated that:

Convicted laboratory owners, who have cooperated with the Government, advise that they had no desire to get business by paying kickbacks. They claim that they made the payments only because they felt they were economically forced to do so. Several convicted lab owners report that the kickback payment was quite essential in obtaining physicians' accounts. If no kickback was paid, the doctor would take his business elsewhere.

Id.; see also *Medicare & Medicaid Fraud: Hearing Before Senate Comm. on Finance*, 96th Cong., 2d Sess. 7 (1980) (statement of Oliver B. Revell, Assistant Director, Chief of Criminal Investigative Division, FBI). Assistant Director Revell stated: "It became immediately apparent [to FBI agents conducting an undercover investigation]

difficulties in applying the statutes and regulations pertaining to this problem.⁴⁸

The last type of fraud historically prosecuted, "Proving and Billing for Unnecessary Services," has rarely been pursued. Providing unnecessary or substandard health care services becomes criminal fraud when, as a prerequisite to payment, a provider knowingly misrepresents that the services rendered were necessary or competently provided.⁴⁹ This theory is difficult to prove, and as reported cases reflect, has been employed only when the services were blatantly and uncontrovertedly unnecessary.⁵⁰ Examples of its use include the prosecution of dentists who performed root canals on "badly broken down . . . non-restorable" teeth⁵¹ and an obstetrician who billed medically indicated and necessary examinations that included "the [rubbing] and [massaging] in a sexual manner, the vaginal and anal areas, the breasts and the buttocks of patients."⁵²

Chart 1 shows the frequency of each of these types of fraud.⁵³

that kickbacks and rebates were a way of life. Virtually every provider of ancillary services . . . made offers of rebates and kickbacks.").

48. See Bucy, *Fraud by Fright*, *supra* note 5 at 914-20; Michael J. Tichon, *Structuring Ventures in a Post Hanlester and Safe Harbors World*, 14 Whittier L. Rev. 169, 173 (1993).

49. Bucy, *Fraud By Fright*, *supra* note 5, at 920.

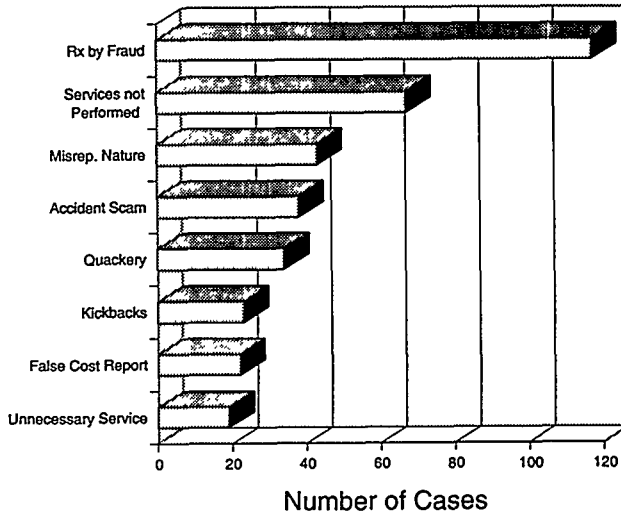
50. *Id.* at 931.

51. *United States v. Talbott*, 460 F. Supp. 253, 264 (S.D. Ohio), *aff'd*, 590 F.2d 192 (6th Cir. 1978).

52. *United States v. Casey*, No. 88-48, indictment at 4 (E.D. Mo. March 11, 1988).

53. Case names and cites to accompany chart 1 are provided in appendix I.

Frequency of Fraud Theories

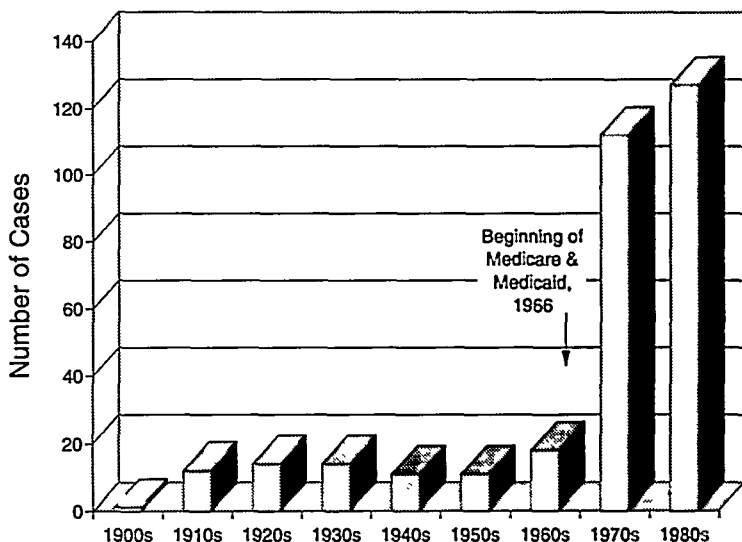


- CHART 1 -

Chart 2 demonstrates the chronological distribution of the reported prosecutions of health care providers.⁵⁴

54. Case names and cites to accompany chart 2 are provided in appendix II.

Chronological Distribution of Prosecutions of Health Care Providers



- CHART 2 -

As can be seen from chart 2, there was a dramatic jump in prosecutions in the 1970s. This may be due to several factors. First, beginning in 1966, with the implementation of Medicare and Medicaid, the government became a medical insurer and thus the financial victim of fraudulent health care providers.⁵⁵ Prosecutors have more resources available than do private insurers to pursue such conduct. Second, the volume of dollars going to health care has dramatically increased, rising from less than half of \$1 billion in 1966⁵⁶ to \$214.7 billion in 1979.⁵⁷ Third, prosecutors did not begin to focus on many white collar crimes until the 1970s.⁵⁸

The explosion in prosecutions of health care providers has affected an increasing variety of providers. As chart 3 shows, prior to 1970,

55. Medicare is codified in various sections of Title 42 of the United States Code, primarily in 42 U.S.C. § 1395-l (1992). Medicaid is also codified in various sections of Title 42, primarily in 42 U.S.C. § 1396-p (1992).

56. Bureau of the Census, U.S. Dep't of Commerce, 1 Historical Statistics of the United States, Colonial Times to 1970, at 73 (1971) (showing that total health care expenditures in 1966 were \$44,974,000).

57. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1987, at 84 (1986).

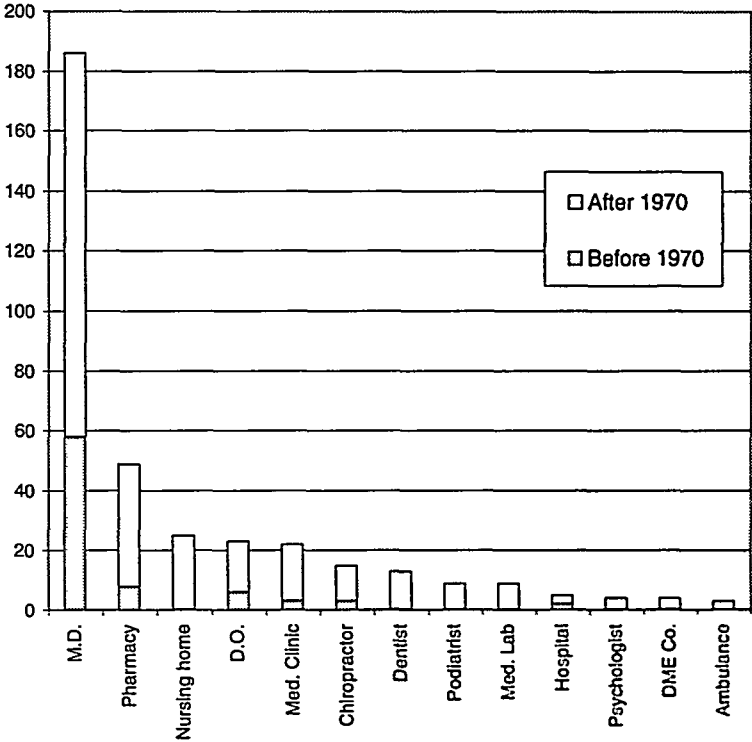
58. See Herbert Edelhertz, *Introduction to White-Collar Crime: An Agenda for Research 1* (Herbert Edelhertz & Thomas D. Overcast eds., 1982); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors To Go?*, 54 U. Pitt. L. Rev. 405, 408 (1993).

most prosecutions of health care providers concerned physicians or pharmacies.⁵⁹ No reported prosecutions of providers for health care fraud concerned nursing homes, dentists, podiatrists, medical laboratories, psychologists or durable medical equipment or ambulance companies. The frequency with which other providers have been prosecuted, however, has increased dramatically since 1970. This expansion of prosecutions is consistent with the overall growth of health care professions.⁶⁰

59. Cases names and cites to accompany chart 3 are provided in appendix III.

60. New health care providers such as home health agencies, durable medical equipment companies, ambulatory medical clinics and the individual providers who staff these entities have all increased recently. Home care (now a \$13 billion per year market) is one of the "fastest-growing" segments of the health care industry. Licensing is not required for home health agencies, such that only about one-third of the 6000-7000 existing companies even belong to the professions trade association, and the government has few standards for operation of home health agencies. For example, until recently, the federal government did not have standard definitions for medical equipment sold for home use, allowing some companies to make "huge profits" by "billing for parts of equipment, piece by piece, when the entire package should be sold and billed together." Robert Pear, *Abuse Widespread in Medical Sales for Care at Home*, N.Y. Times, Sept. 29, 1991, at A24.

Changes in Types of Health Care Providers
Prosecuted since 1970

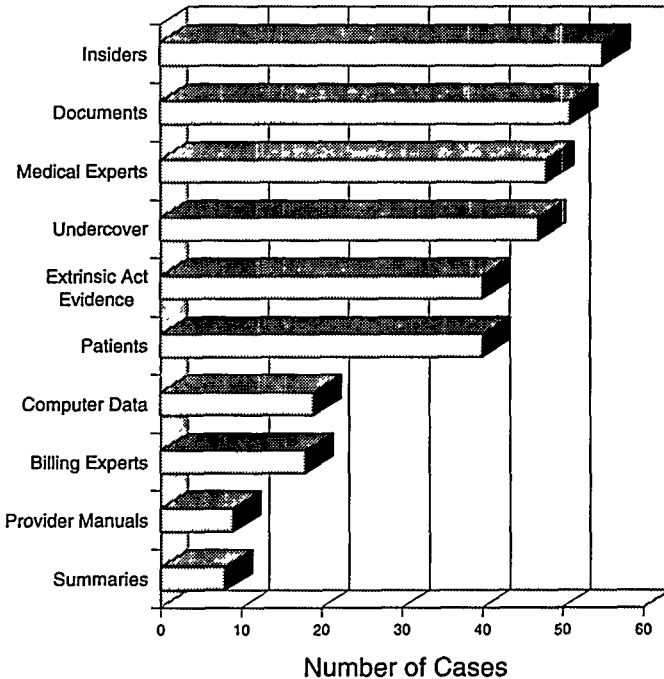


- CHART 3 -

The reported health care fraud prosecutions also reveal that ten major types of evidence have been used to prove health care fraud. As shown in chart 4, documents, insiders, experts, and extrinsic act evidence are the four dominant types of evidence used, accounting for sixty percent of all evidence employed.⁶¹

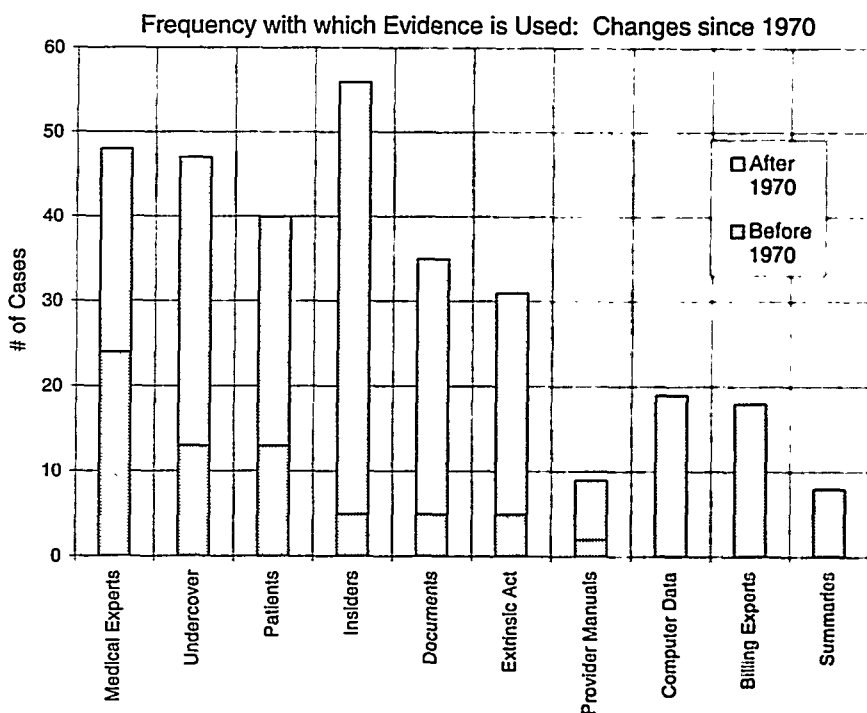
61. Case names and cites to accompany chart 4 are provided in appendix IV.

Types and Frequency of Evidence Used in Reported
Prosecutions of Health Care Providers



- CHART 4 -

As chart 5 shows, there are chronological trends in the types of evidence used by prosecutors in reported prosecutions of health care providers. For example, medical experts and evidence from undercover operations were used more in pre-1970 prosecutions. On the other hand, neither computer evidence nor billing experts were used before 1970.



- CHART 5 -

Few of the health care fraud convictions were reversed on appeal: seventy-one percent of pretrial motions⁶² and seventy-three percent of the post-conviction appeals were resolved in favor of the government.⁶³ Of the reported opinions in which evidence was suppressed or a conviction was reversed, twenty-five percent were suppressed or reversed because of improper evidentiary rulings by the lower court.⁶⁴ As chart 6 reveals, by far the most common evidentiary error was improper admission of extrinsic act evidence.⁶⁵

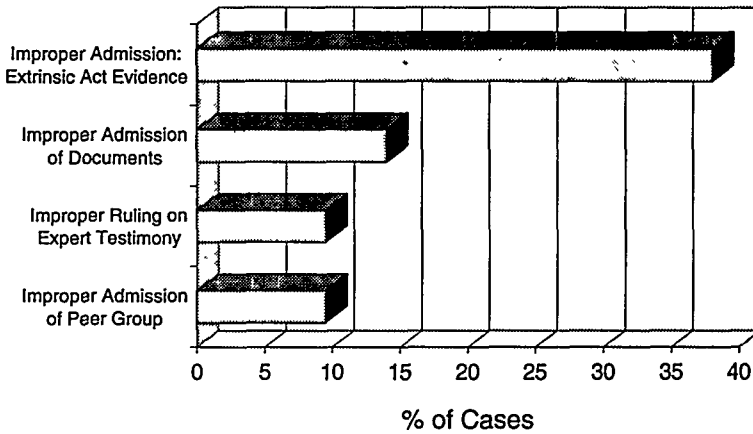
62. Case names and cites are provided in appendix V.

63. *Id.*

64. *Id.*

65. Case names and cites to accompany chart 6 are provided in appendix VI.

Grounds For Unfavorable Evidentiary Rulings by Appellate Courts



- CHART 6 -

II. EXPERT WITNESS TESTIMONY

Expert testimony, employed in twenty-one percent of the reported cases,⁶⁶ has been an essential part of health care prosecutions.⁶⁷ This section discusses the evolving nature of this testimony, the complications that arise when a government agent also testifies as an expert, and whether proponents of expert testimony in white collar criminal cases, usually the government, optimally utilize the aids available under evidentiary codes for presenting expert testimony. This section concludes by suggesting that white collar criminal cases, as shown by reported health care fraud prosecutions, are propelling expert testimony in two new directions: more frequent use of legal experts who explain applicable laws and regulations to fact finders, and more frequent use of members of the government's investigating team as expert witnesses.

A. *Evolving Types of Experts: Billing Experts*

Although expansive use of expert testimony suggests that this type of evidence should be allowed, courts should take care to protect the rights of defendants, such as by offering a *voir dire* of these witnesses away from the jurors. This section suggests that prosecutors, or plaintiffs proving civil health care fraud, should make greater use of *modus operandi* expert testimony because it is an effective way of communicating the economic motive behind the fraud alleged.

66. See *supra* chart 4 & *infra* appendix IV.

67. Bucy, *Fraud By Fright*, *supra* note 5, at 890-92, 898, 907, 922-23.

1. Use of Billing Experts in Health Care Fraud Prosecutions

Throughout the twentieth century, as the types of crimes for which health care providers have been prosecuted have changed, so have the types of expert and expert testimony offered. For most of the twentieth century, providers have been prosecuted on "Rx By Fraud"⁶⁸ or "Quackery" theories of fraud.⁶⁹ In both of these types of cases, medical experts were necessary witnesses. In the "Rx By Fraud" cases, these experts testified about the medically indicated bases for prescribing controlled substances, the scope of a professionally appropriate examination preceding any such prescriptions, and acceptable dosages and frequencies of such prescriptions.⁷⁰ In the "Quackery" cases, experts testified about the viability, or lack thereof, of defendants' curative claims.⁷¹

Approximately twenty years ago, the type of offenses for which health care providers were prosecuted began to change. Currently, providers are prosecuted most aggressively for billing and reimbursement frauds. Sixty-three percent of reported health care fraud prosecutions since 1970 concerned billing frauds, whereas only fourteen percent of the reported prosecutions prior to 1970 concerned such frauds.⁷² Even the "Rx By Fraud" cases have taken on a billing fraud

68. In 31% (117) of the reported health care fraud prosecutions, providers have been prosecuted for improper issuance of prescriptions for controlled substances ("Rx By Fraud"). See *supra* chart 1 & *infra* appendix I.

69. In just over nine percent (34) of the reported health care fraud prosecutions, providers have been prosecuted for making false claims about their healing abilities ("Quackery"). *Id.*

70. See, e.g., *United States v. Green*, 511 F.2d 1062, 1072-73 (7th Cir.) (involving expert testifying as to customary medical procedures for prescribing drugs), *cert. denied*, 423 U.S. 1031 (1975); *United States v. Bartee*, 479 F.2d 484, 488 (10th Cir. 1973) (involving experts testifying as to legitimacy of prescribing controlled substances). As the United States Court of Appeals for the Tenth Circuit noted, "Expert testimony with respect to recognized medical standards and methods of treating patients, such as those for whom the prescriptions were furnished, [will be] admissible because of its bearing upon the intent and purpose with which the prescriptions were issued." *Strader v. United States*, 72 F.2d 589, 592 (10th Cir. 1934).

71. See, e.g., *United States v. Andreadis*, 366 F.2d 423, 433 (2d Cir. 1966) (using expert testifying as to widespread belief of drug's effectiveness), *cert. denied*, 385 U.S. 1001 (1967); *Baker v. United States*, 115 F.2d 533, 539 (8th Cir. 1940) (using experts to describe proper method of treatment for cancer), *cert. denied*, 312 U.S. 692 (1941); *Barnhill v. United States*, 96 F.2d 116, 119-20 (10th Cir. 1938) (using physicians testifying as to curative effects of defendant's medicine for tuberculosis).

72. Since 1970, 63% of the reported prosecutions of health care providers for health care fraud have focused on billing frauds. Of the 278 reported prosecutions of health care providers since 1970, 175 have focused on billing frauds: 65 for billing for services not provided; 39 for billing for a more expensive service than what was actually provided; 22 for filing false cost reports; 34 for billing for fictitious or unnecessary services rendered in staged or fictitious accidents and; 15 for billing for unnecessary services while falsely representing that such services were necessary. Of the 94 reported prosecutions of health care providers prior to 1970, 13 focused on billing frauds: two for billing for services not provided; three for billing for a more expensive service than was actually provided; none for filing false cost reports; four for billing

component. Today the provider who formerly profited simply by "selling" prescriptions for controlled substances may well require the "patients" who want these prescriptions to submit to medical tests and procedures, thereby allowing the provider to profit by billing insurers for services rendered.⁷³

The type of expert now employed in reported health care fraud prosecutions reflects these changes. Today, the expert in a health care fraud prosecution is likely to be a billing expert. In twenty-seven percent of all reported health care fraud prosecutions where expert testimony was used, the expert was a billing expert.⁷⁴ This trend has become even more dramatic since 1970: in forty-two percent of all of the post-1970 reported health care fraud prosecutions wherein expert testimony was used, the expert was a billing expert.⁷⁵ Billing experts are health care professionals of a new genre. They are not health care providers skilled in the practice of medicine, but bureaucrats in public or private health insurance specializing in the meaning and application of billing procedures.

*Sheriff v. Spagnola*⁷⁶ demonstrates the significance of billing experts in health care prosecutions.⁷⁷ Spagnola was the owner of a speech therapy clinic. Along with the bookkeeper of the clinic, Spagnola was indicted on fifty-seven counts of obtaining money under false pretenses by over-billing Medicaid for speech therapy rendered on some of the clinic's patients.⁷⁸ The lower court dismissed all charges finding that the evidence submitted to the grand jury failed to show probable cause.⁷⁹ The Nevada Supreme Court affirmed in part and reversed in

for unnecessary or fictitious services rendered in staged or fictitious accidents; and, four for billing for unnecessary services while falsely representing that such services were necessary. See *supra* chart 1 & *infra* appendix I.

73. See, e.g., *United States v. Mahar*, 801 F.2d 1477, 1490 (6th Cir. 1986) (affirming finding that defendant required patient to submit to medically unnecessary testing procedures to obtain controlled substances).

74. Expert testimony has been used in 66 of the reported health care prosecutions. In 18 of these cases, the expert was a billing expert; in 48 of these cases the expert was some type of medical expert. See *supra* chart 4 & *infra* appendix IV.

75. Since 1972, there have been 42 reported opinions of health care fraud prosecutions where expert testimony was used. In 18 of these cases, the expert was a billing expert; in 24 of the cases the expert was a medical expert. See *id.*

76. 706 P.2d 840 (Nev. 1985).

77. Other cases where billing experts were employed include: *United States v. Siddiqi*, 959 F.2d 1167 (2d Cir. 1992); *United States v. Hooshmand*, 931 F.2d 725 (11th Cir. 1991); *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *United States v. Collins*, 596 F.2d 166 (6th Cir. 1979); *United States v. Zacher*, 586 F.2d 912 (2d Cir. 1978); *United States v. Radetsky*, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 994 (10th Cir. 1990); *People v. Einstein*, 435 N.E.2d 1257 (Ill. App. Ct. 1982); *State v. Cargille*, 507 So. 2d 1254, (La. Ct. App. 1987); *State v. Ruud*, 259 N.W.2d 567 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978); *People v. Weinberg*, 586 N.Y.S.2d 132 (App. Div. 1992); *People v. Montesano*, 446 N.Y.S.2d 813 (App. Div. 1982).

78. *Spagnola*, 706 P.2d at 841.

79. *Id.* at 841-42.

part.⁸⁰ Key to the reversal was the clarity of the billing requirements. Over objections by the defendant and citing the testimony of the government's expert on billing, the Nevada Supreme Court ruled that the regulations were not ambiguous and adequately put the defendant on notice that his billing practices were wrong.⁸¹

The billing expert in *Spagnola* testified before the grand jury about the "proper" method of billing travel expenses incurred in reaching a patient's home or nursing home.⁸² This expert also compared the billing practices of other speech clinics in Nevada to those of the defendant's clinic, testifying that the defendant's clinic was alone in its interpretation of the relevant regulations.⁸³ This type of "peer group comparison" can provide a helpful check on expert testimony, and thus help defendants.⁸⁴ In *Spagnola*, however, such evidence helped the government because comparing Spagnola's billing pattern to that of other speech therapy clinics helped undercut Spagnola's defense that the billing regulations were ambiguous.

There may be occasions when peer group comparisons help the defense by undercutting the government's expert. In particular, evidence that peer providers of a defendant have followed various interpretations of relevant regulations could buttress a defendant's claim that the regulations are confusing. For example, in *United States v. Siddiqi*,⁸⁵ an oncologist, was convicted on charges of mail fraud, theft of government property, and false claims stemming from bills he submitted to Medicare for chemotherapy that was administered to his patients.⁸⁶ At issue was whether these patients were under Siddiqi's "supervision" at the time of this therapy. Siddiqi argued that they were, even though he was out of town when the chemotherapy was actually rendered, asserting that he sent his patients to the hospital for outpatient chemotherapy treatment, selected their treatment and dosage, monitored their progress through chart review, and arranged for another physician to cover the patients if the need arose when he was out of town.⁸⁷ Siddiqi presented expert and lay testimony that there was "widespread confusion" among Siddiqi's peers regarding proper billing practices and that his interpretation of "supervision" was shared by others.⁸⁸

80. *Id.* at 845.

81. *Id.* at 842-43.

82. *Id.* at 842.

83. *Id.* at 843.

84. *Fraud By Fright*, *supra* note 5, at 880.

85. 959 F.2d 1167 (2d Cir. 1992).

86. *Id.* at 1169-70.

87. *Id.* at 1170.

88. *Id.* at 1171. The Second Circuit remanded this case to the lower court to make preliminary findings regarding the admissibility of allegedly new evidence that Siddiqi located after trial, which may have been relevant to his good faith in interpreting the billing regulations as he did. *Id.* at 1174.

Currently, defendants are unlikely to obtain access to peer group comparative evidence through ordinary methods of discovery. The discovery provisions in Federal Rule of Criminal Procedure 16, for example, do not require the government to provide such discovery.⁸⁹ Even the expanded discovery now required for expert witnesses requires a party only to disclose the basis of the expert's testimony.⁹⁰ Because peer group comparison data may not be readily available or because it may be unfavorable, it may not be a "basis" for the government expert's opinion and thus not included in provided discovery. Therefore, defendants should subpoena this data, and courts should enforce defense efforts to acquire peer group comparisons from the insurers able to provide such information. Because it could be difficult for defendants to ascertain whether such evidence exists, defendants should be allowed the use of limited interrogatories or depositions so as to flesh out sufficient information for subpoenaing purposes.

2. Propriety of Using Billing Experts Under Current Evidentiary Codes

Because most health care fraud prosecutions now allege some sort of billing irregularity and because of the complexity, volume, and sometimes inconsistency of applicable billing requirements, billing experts will be needed by both sides in health care fraud prosecutions. The billing regulations governing health care reimbursement are voluminous and complex,⁹¹ and most providers must comply with several different sets of regulations for each insurance program covering patients treated by a provider. This is complicated further because each insurer has its own codes for each procedure performed, different amounts to charge for each procedure, and different requirements as

89. See Fed. R. Crim. P. 16.

90. Effective December 1, 1993 the following amendment to Federal Rule of Criminal Procedure 16 went into effect:

At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

Fed. R. Crim. P. 16(a)(1)(E).

The following amendment, providing for reciprocal discovery, also went into effect:

If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.

Fed. R. Crim. P. 16(b)(1)(C).

91. *Fraud by Fright*, *supra* note 5, at 877 & n.174.

to how the procedure should be performed.⁹² The government will need billing experts to guide fact finders through these various applicable regulations. Defendants will need billing experts in their effort to show the inapplicability of, or at least confusion about, such regulations.⁹³

Testimony by billing experts interpreting complex regulations is consistent with the emphasis in current evidentiary codes on greater admissibility of expert witness testimony.⁹⁴ Such testimony readily fits the "helpfulness" standard for admissibility: it becomes admissible

92. For example, in *State v. Romero*, 574 So. 2d 330 (La. 1990), the defendants, both physicians, were recruited by a Louisiana hospital to locate and treat Medicaid patients in Louisiana. They were convicted several years later of making false claims to the Louisiana Medicaid program. Although there was other evidence of intent that led the appellate court to affirm some of the counts of both defendants, the evidence regarding the billing codes is typical of the problems with the codes. Louisiana providers billing Medicaid for treatment of Medicaid patients were to consult the "Provider Manual" to file their claims for reimbursement. The state agency charged with administering the Medicaid program prepared this manual. It contained "hundreds of diagnosis codes." *Id.* at 332 n.4. "For example, there are eleven gradations of 'office visit' . . . with five levels of service for new patients and six for established patients." *Id.*

The Medicaid state agency contracted with a private insurer to print and distribute the "Provider Manuals." The evidence showed that the Louisiana Medicaid manual was frequently changed or updated (seven times in one of the years for which the defendants were charged). *Id.* at 341 n.9. Also, the "Provider Manuals" were sometimes not distributed and providers had to wait months for one, or use outdated manuals or manuals from other jurisdictions. *Id.* at 340-41.

The provider manual used by the *Romeros* incorporated by reference other manuals, for example, the Current Procedural Terminology (CPT), published by the American Medical Association. Yet, as shown in the *Romero* case, "Not all of the codes listed in the CPT books have been adopted by the Medicaid system and the provider manuals do not indicate which CPT codes are used in Medicaid, but provide only a broad description of what is covered." *Id.* at 332. Sometimes the CPT conflicts with the Medicaid manual. *See id.* at 338.

In addition, see *United States v. Hooshmand*, 931 F.2d 725 (11th Cir. 1991), where the conviction of a physician for billing irregularities was affirmed. The court discussed the fact that reimbursement for Medicare services rendered in Florida is governed by a "Carrier Manual" published by Blue Cross. This carrier manual derived its terms and codes from the CPT and the Florida Relative Value Studies (FRVS). *Id.* at 729-30. The defense (unsuccessful in this case) centered on the confusion and ambiguity in these billing codes. *Id.* at 731.

93. Defendants in the following cases presented a "confusion" defense: *United States v. Peterson*, 488 F.2d 645, 649-51 (5th Cir.) (reversing the conviction of defendant, a physician, because of confusion over billing requirements), *cert. denied*, 419 U.S. 828 (1974); *People v. Berke*, 603 N.E.2d 737, 739-41 (Ill. App. Ct. 1992) (acquitting defendant of many of the counts against him after explaining his misunderstanding of billing requirements); *People v. Alizadeh*, 452 N.Y.S.2d 425, 432-33 (App. Div. 1982) (reserving conviction of defendant in part because of this defense); *Commonwealth v. Stein*, 546 A.2d 36, 38-40 (Pa. 1988) (dismissing Medicaid fraud charges brought against defendant because the relevant billing regulations were found to be unconstitutionally vague), *cert. denied*, 490 U.S. 1046 (1989).

94. For an excellent overview of the Federal Rules of Evidence and how they encourage greater admissibility of expert testimony, see Margaret A. Berger, *United States v. Scop: The Common Law Approach to an Expert's Opinion About a Witness's Credibility Still Does Not Work*, 55 Brook. L. Rev. 559 (1989). As the advisory

because it "will assist the trier of fact to understand the evidence or to determine a fact in issue."⁹⁵

Limited use of experts to explain complex regulations has long been approved in white collar criminal cases. In *United States v. Unruh*,⁹⁶ for example, where four defendants were convicted of check kiting and misappropriation of bank funds, an FDIC bank examiner was permitted to explain to the jury a regulation pertaining to bank board approval for loans.⁹⁷ In *United States v. Bilzerian*,⁹⁸ a securities law expert was permitted to provide the jury with "general background on federal securities regulation and the filing requirements" for a specific schedule, as well as "clarify any ambiguity in the instructions" on the schedule.⁹⁹

Bilzerian also highlights the problem in allowing billing experts to testify. By interpreting the meaning and application of relevant regulations guiding a party's behavior, such experts run the risk of invading the province of the trial judge by instructing the jury on the law applicable to the facts before it.¹⁰⁰ It is possible for courts, however, to guide these experts' testimony carefully so as to avoid, or at least limit, this danger. In *Bilzerian*, for example, the court restricted the government expert's testimony to general background and excluded the defense's proffered expert altogether because his testimony would constitute "an ultimate legal conclusion based upon the facts of the case."¹⁰¹

Numerous cases speak of the danger of allowing expert witnesses to give opinions on the meaning of specific laws at issue in a case.¹⁰² *United States v. Benson*¹⁰³ is typical. The Seventh Circuit reversed Benson's conviction for income tax evasion after finding that the testimony of the government's expert invaded the jury's province.¹⁰⁴ The expert witness was an IRS agent who had explained general tax law concepts as well as the requirement for filing income tax returns before opining that specific payments received by the defendant were

committee noted, "The use of [expert] testimony has greatly increased since enactment of the Federal Rules of Evidence." 137 F.R.D. 53, 156 (1991).

95. Fed. R. Evid. 702.

96. 855 F.2d 1363 (9th Cir. 1987), *cert. denied*, 488 U.S. 974 (1988).

97. *Id.* at 1375-76.

98. 926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991).

99. *Id.* at 1294-95.

100. *Id.* at 1294.

101. *Id.* at 1295.

102. See, e.g., *Molecular Technology Corp. v. Valentine*, 925 F.2d 910, 919 (6th Cir. 1991) (reversing judgment because trial court "repeatedly allowed plaintiffs' expert to testify as to the requirements of federal securities disclosure laws"); *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984) (reversing judgment because trial court permitted a bankruptcy judge to testify as an expert witness about a question of bankruptcy law).

103. 941 F.2d 598 (7th Cir. 1991), *amended*, 957 F.2d 301 (7th Cir. 1992).

104. *Id.* at 601.

gross income.¹⁰⁵ The court held that this witness was "no more qualified than the jury" to draw inferences from the evidence.¹⁰⁶ Similarly, the Eighth Circuit found error in a civil fraud case because the expert witness "went too far" when he instructed the jury on the meaning of a Securities and Exchange Commission regulation.¹⁰⁷

If instructing a jury on the meaning of provisions is going too far, then billing experts in health care fraud prosecutions may also have gone too far. As noted in *Spagnola*, the expert testified about the "proper method of billing Medicaid for travel expenses."¹⁰⁸ In both *State v. Romero*¹⁰⁹ and *State v. Cargille*,¹¹⁰ the experts testified that the applicable billing requirements disallowed the billing practices for which the defendants were on trial.¹¹¹ In *State v. Ruud*,¹¹² the government expert was allowed to testify about the general background of a regulation regarding cost reporting requirements for nursing homes as well as state his opinion about whether the specific expenses at issue in the trial complied with this regulation.¹¹³

This Article suggests that the use of billing experts in health care fraud prosecutions is one instance where the accepted dogma about the proper scope of expert testimony does not fit in the context of white collar crimes. Recognizing that it is a court's duty to instruct fact finders about the law,¹¹⁴ this Article suggests that for three reasons, experts on applicable laws and regulations should be allowed to testify about the meaning and applicability of these laws and regulations in white collar criminal cases. First, as the health care fraud prosecutions demonstrate, regulations applicable to the conduct at issue often are confusing. There is room for legitimate difference in opinion as to how these laws and regulations should be or have been interpreted. Testimony by and examination of expert witnesses may be the only viable way to flesh out these disagreements. The fact that such differences of opinion exist may transform this apparent issue of law into a mixed issue of fact and law as fact finders struggle to apply law to the facts before them.¹¹⁵ Second, the right of confrontation

105. *Id.* at 603-04.

106. *Id.* at 604.

107. *Police Retirement Sys. v. Midwest Inv. Advisory Serv., Inc.*, 940 F.2d 351, 357 (8th Cir. 1991).

108. *Sherriff v. Spagnola*, 706 P.2d 840, 842 (Nev. 1985).

109. 574 So. 2d 330 (La. 1990).

110. 507 So. 2d 1254 (La. Ct. App. 1987).

111. *Romero*, 574 So. 2d at 338; *Cargille*, 507 So. 2d at 1258-59.

112. 259 N.W.2d 567 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978).

113. *Id.* at 574.

114. *See, e.g., United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984) ("It was not proper for the witness to testify as to a legal conclusion; it is the sole function of the trial judge to instruct the jury on the law."); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.) ("It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge."), *cert. denied*, 434 U.S. 861 (1977).

115. *See Note, Expert Legal Testimony*, 97 Harv. L. Rev. 797, 798-803 (1984). This Note argues for greater admissibility of expert legal testimony for the following three

guaranteed to criminal defendants by the Sixth Amendment¹¹⁶ makes it fairer, if not constitutionally required, for defendants in criminal cases to examine witnesses about the meaning of applicable regulations rather than simply to litigate the issue in a jury instruction conference. Third, given the complexity of billing regulations, it may be unfair to deprive the parties of the pedagogical opportunity billing experts provide. In some cases, it may not be possible for either party to litigate the fraud issues with the clarity needed in criminal cases without producing a witness who can explain billing regulations and how they apply to the facts of the case. Although expansive use of experts on the law is desirable, there is a potential danger in allowing a witness to explain the law to the jury, namely, that the court may disagree with the witness's explanation. To guard against this, courts in white collar criminal cases should *voir dire* such experts out of the hearing of the jury.

B. Government Agents as Expert Witnesses

Courts routinely allow government agents who have helped investigate a case to testify as to facts they have observed during their investigations.¹¹⁷ In the reported health care fraud prosecutions, case agents testify with some regularity as expert witnesses. In over ten percent of the health care prosecutions where expert testimony was presented, the expert witness was an agent who had assisted in the investigation.¹¹⁸ An examination of these prosecutions suggests that:

reasons: (1) it is hard to separate questions of fact and law; (2) some courts admit such testimony anyway; and (3) such testimony can be helpful in some cases, and it is an exaggeration to suggest that judges are the experts on the law. This Note points to the following potential problems with expert legal testimony: (1) parties retain only experts who agree with them; (2) the trial becomes a "battle of the experts;" and (3) the judges role is usurped. *Id.* at 808-11. This Note also suggests implementation of the following procedural safeguards to overcome these potential problems: (1) court appointment of experts; (2) court instructions on relevant law during the presentation of the evidence rather than just at the end; (3) prescreening of expert testimony by a court; and (4) permitting only expert testimony that complements the court's view of the law. *Id.* at 811-14.

116. U.S. Const. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"

117. See, e.g., *Martin v. Wainwright*, 770 F.2d 918, 922-23 (11th Cir. 1985) (allowing detectives to testify to incriminating statements made by defendant), *modified*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986); *United States v. Andrews*, 765 F.2d 1491, 1500-01 (11th Cir. 1985) (permitting testimony of agent who acted in undercover capacity about his encounters with the defendant), *cert. denied*, 474 U.S. 1064 (1986); *State v. Elstad*, 658 P.2d 552, 553 (Or. Ct. App. 1983) (officers testifying to incriminating statements made by defendant), *rev'd*, 470 U.S. 298 (1985).

118. See, e.g., *United States v. Gold*, 743 F.2d 800, 816-17 (11th Cir. 1984) (special agent from Department of Health and Human Services), *cert. denied*, 469 U.S. 1217 (1985); *Nigro v. United States*, 117 F.2d 624, 631 (8th Cir. 1941) (narcotic agent); *People v. Lawrence*, 18 Cal. Rptr. 196, 203-04 (Ct. App. 1961) (Bureau of Narcotic Enforcement agent); *People v. Einstein*, 435 N.E.2d 1257, 1259-60 (Ill. App. Ct. 1982) (special agent for Illinois Department of Law Enforcement); *State v. Cargille*, 507 So.

(1) a case agent testifying as an expert witness also often testifies as to facts, and this dual role may enhance his stature both as a fact witness and as an expert witness; (2) case agents serving this dual role are "land mine" witnesses for defendants; and (3) the notion of "case agent" should be broadened for white collar criminal cases when assessing the prejudice presented by case agent expert witnesses.

1. Hybrid Fact/Opinion Testimony

*State v. Ruud*¹¹⁹ and *State v. Cargille*¹²⁰ illustrate the dual role played by government agents who testify as experts. In *Ruud*, in which a nursing home and its owners were convicted for filing false cost reports with Medicaid, an audit supervisor testified as to the facts, including the particulars of the field audit that was conducted of the nursing home and the auditors' attempts to get explanations from the defendants.¹²¹ This witness was also qualified as an expert and gave his opinion about certain expenses charged to Medicaid and at issue in the criminal prosecution. For example, he opined that the "linens" listed on the nursing home cost report included a girdle, a handbag, a sweater, and slacks.¹²²

Such blending of fact and opinion testimony also occurred in *Cargille*, in which the defendant, a physician, was convicted of Medicaid fraud.¹²³ An Assistant Division Director of Medicaid testified as to facts, which included statements made by the defendant. According to this witness's testimony, the "defendant was well aware of the bar, but . . . objected to the recoupment policy of the program."¹²⁴ This witness was also qualified as an expert witness and testified as to the proper billing procedure for office visits and the capacity and procedures of Medicaid computers.¹²⁵

The auditing expert in *Ruud* and the Assistant Division Director of Medicaid in *Cargille* testified about both facts and opinion. Such blending would seem to enhance both of their roles. As fact witnesses, they have more credibility because they are viewed as experts, even though in both of these cases their expertise (billing procedures) did not extend to the facts about which they testified (conversations

2d 1254, 1258 (La. Ct. App. 1987) (investigator for Louisiana Department of Justice, Medicaid Fraud Control Unit); *State v. Ruud*, 259 N.W.2d 567, 574 (Minn. 1977) (audit director of the audit division of the Department of Welfare), *cert. denied*, 435 U.S. 996 (1978); *People v. Montesano*, 446 N.Y.S.2d 813, 814 (App. Div. 1982) (auditor from Medicaid Fraud Unit).

119. 259 N.W.2d 567 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978).

120. 507 So. 2d 1254 (La. Ct. App. 1987).

121. *Ruud*, 259 N.W.2d at 574.

122. *Id.* The appellate court found that the defendants failed to raise an objection to the agent's testimony at trial, and thus "may not raise it now." *Id.* at 575.

123. 507 So. 2d at 1256.

124. *Id.* at 1258.

125. *Id.*

with the defendants). As expert witnesses, they would have more impact because they have specific facts to offer the jury regarding the immediate issues before the jury (the defendant's state of mind).

2. "Land Mine" Experts

Use of case agents as expert witnesses may create "land mines" for defense counsel who must cross-examine these experts.¹²⁶ As individuals who have been involved, even tangentially, in the preparation of the case against the defendant, these witnesses may have access to unfavorable information about defendants that would not come into evidence if the cross-examiner had not unknowingly opened the door. When a case agent's testimony has been restricted to the concrete facts that the agent allegedly observed, the chance of a cross-examiner treading into a "dangerous" area is less probable than when the case agent has testified to something as open-ended as opinion.

Not only is an opinion more abstract and thus subject to more wide ranging cross-examination, but opinion testimony also opens the door for admission of hearsay. By its terms, Federal Rule of Evidence (FRE) 703 permits admission of hearsay solely because it forms the basis for the expert's opinion.¹²⁷ Although criticized by some com-

126. Phylis Skloot Bamberger, *The Dangerous Expert Witness*, 52 Brook. L. Rev. 855, 858 (1986). Cf. *United States v. Scop*, 846 F.2d 135, 138 (2d Cir.) (reversing conviction where government's investigatory agent testifying as an expert witness allegedly based his testimony "solely on the testimony and documentary evidence introduced at trial"), *rev'd in part on reh'g*, 856 F.2d 5 (2d Cir. 1988). According to the Second Circuit:

We believe it to be virtually impossible for an investigator so deeply involved in a case to put aside previous judgments regarding the credibility of witnesses and to render de novo judgments on their credibility after listening to the trial [S]uch testimony by an investigator and opinions based thereon are clearly prejudicial when offered to a jury.

Id. at 143. See also Berger, *The Common Law Approach*, *supra* note 94, at 569-82 (providing an excellent analysis of the difficulties presented when case agents testify as expert witnesses).

127. FRE 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known* to the expert." Fed. R. Evid. 703 (emphasis added).

mentators and courts,¹²⁸ some courts admit hearsay contained in expert opinion.¹²⁹

*United States v. Affleck*¹³⁰ demonstrates the willingness of some courts to admit inadmissible hearsay. Affleck was convicted of securities fraud. A government accountant, qualified as an expert, testified as to the financial status of the defendant's company and whether any misrepresentations were made to investors. In preparation for his testimony, this accountant examined records and interviewed a number of people, including other accountants who had worked for the defendant's company, former employees, and the trustee in bankruptcy. During his testimony, this expert witness related "what he had been told by those whom he had interviewed."¹³¹ Admission of this hearsay was permitted because such conversations "are of the type reasonably relied on by other experts in the accounting field in a case such as this."¹³²

*Lewis v. Rego*¹³³ provides another example of a court willing to admit hearsay damaging to the defendant because it formed part of the basis of an expert's opinion. This products liability suit arose out of the explosion of a propane cylinder. Judgment in favor of the defendants was reversed on appeal on the grounds that the trial court improperly limited the expert's testimony of hearsay, which formed the basis of the expert's opinion.¹³⁴ Specifically, the expert was not allowed to testify as to the content of a report prepared by another expert nor as to the conversation between the testifying expert and the

128. See, e.g., *Scop*, 846 F.2d at 138-43 (concluding that expert witness may not assess personal credibility of witness's testimony); *United States v. Young*, 745 F.2d 733, 765 (2d Cir. 1984) (Newman, J., concurring) (questioning expert's opinion that ambiguous conduct constituted a crime), *cert. denied*, 470 U.S. 1084 (1985); *Berger*, *supra* note 94, at 575-82 (discussing investigative agents as expert witnesses); Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. Fla. L. Rev. 234, 242-51 (1984) (stating that even "indirect" admission of hearsay evidence harms defendant's Sixth Amendment rights); Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 Minn. L. Rev. 859 (1992) (commenting that the operation of the federal rules against hearsay evidence is harmed by expert witnesses who act as "conduits" for hearsay).

129. See, e.g., *Lewis v. Rego Co.*, 757 F.2d 66, 74 (3d Cir. 1985) (allowing metallurgist-expert to testify about his conversation with another metallurgist because this type of conversation "was the kind of material on which experts in the field base their opinions"); *Stevens v. Cessna Aircraft Co.*, 634 F. Supp. 137, 142 (E.D. Pa.) (permitting expert in aeronautical medicine to give expert opinion that deceased pilot was under a great deal of stress, which "might well have hampered his performance as a pilot," even though part of the basis for the expert's opinion was information he learned from interviewing the deceased pilot's associates, friends, co-workers, and professors), *aff'd*, 806 F.2d 254 (3d Cir. 1986).

130. 776 F.2d 1451 (10th Cir. 1985).

131. *Id.* at 1456.

132. *Id.* at 1457.

133. 757 F.2d 66 (3d Cir. 1985).

134. *Id.* at 73.

report's author regarding the report.¹³⁵ In ruling that limiting the admissibility of this hearsay was error, the Third Circuit held that the expert could testify about this hearsay because both the report and the conversation were "the kind of material on which experts in the field base their opinions."¹³⁶

Whether they serve as a vehicle for admission of hearsay or simply because they have access to more information about a defendant than do most expert witnesses, case agents who testify as expert witnesses present unusual difficulties for defendants. The following example indicates how this might be so when a government agent testifies as an expert witness in a health care fraud prosecution. Assume a physician is being prosecuted for billing for services not provided. A government agent testifies as to the amount of the defendant's billings that are allowable under applicable regulations. This witness testifies that his opinion about the legitimacy of the billings is derived from reviewing the defendant's records and from interviews with patients and employees of the defendant. If defense counsel wants to explore this witness's thoroughness in conducting these interviews or the substance of what was said, she risks accidentally eliciting damaging information about her client. For example, the cross examination may reveal incidents of substance abuse, or cruelty or callousness to patients or colleagues. An expert who has been part of the investigating team is more likely to know such "land mine" information and reveal it upon cross-examination.

3. Expanding the Notion of "Case Agent"

The reported health care fraud cases demonstrate why the concept of "case agent" should be expanded to "case team" in white collar criminal cases. In cases involving governmental regulation and reimbursement programs, many individuals within the law enforcement and regulatory bureaucracy contribute to the prosecution of a case.¹³⁷ Some of these individuals are trained in law enforcement investigative techniques, while others are civil administrative investigators who supply accounting or other specialized expertise during an investigation. The expertise that these investigators bring to the investigation and trial preparation is the same expertise that qualifies them as expert witnesses. Thus, in these cases, a group of law enforcement agents and civil investigators fulfills the function served by a lone case agent

135. *Id.*

136. *Id.*

137. Kenneth Mann, *Procedure Rules and Information Control*, in *White Collar Crime Reconsidered* 332, 345 (Kip Schlegel & David Weisburd eds., 1992) (discussing new investigatory powers given to administrative agencies and civil divisions of state and federal enforcement agencies); Diane Vaughan, *Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct* 20-38 (1983) (reviewing the number and role of organizations actively participating in a Medicaid fraud perpetrated by an Ohio Revco drug store).

in most crimes. Moreover, it is not unusual for all of the members of an investigating team to gain access to unfavorable information about defendants during an investigation.

4. Conclusion

There are advantages for the prosecution and disadvantages for the defense of using case agents as expert witnesses: enhanced credibility of the experts, the possibility that evidence unfavorable to the defense will be admitted through cross examination of the expert, and the possible chilling of cross examination of the expert for fear of eliciting "land mine" testimony. Yet, expert witness testimony by agents who worked with the prosecution team is needed. The government cannot and should not investigate complex cases without expert assistance. Moreover, the government should not be deprived of its most informed experts as witnesses at trial simply because they assisted in the investigation. These competing considerations can be accommodated if courts allow defense counsel to conduct *voir dire*, outside the jury's hearing, of government experts who played any role, even advisory, during the government investigation or trial preparation. Such *voir dire* should focus on: exposing the potential for "land mine" testimony by delving into the expert's role in the investigation and/or prosecution team, the expert's access to any evidence relating to uncharged illegal or questionable conduct by the defendant, and the expert's access to the defendant during the pretrial stages of the case.

C. *Modus Operandi* "M.O." Testimony

For years, law enforcement officials have testified as experts about the *modus operandi* (M.O.) of the alleged criminal activity in drug or gambling cases, explaining how seemingly innocuous behavior or conversation is, in fact, criminal activity or discussion of it.¹³⁸ M.O. expert testimony has also been permitted in fraud cases. For example, in *United States v. McCollum*,¹³⁹ where the defendant was convicted on charges of mail fraud and use of a fictitious name, the court permitted expert testimony regarding the "typical structure of mail fraud schemes," noting that such expert testimony "could help the jury to understand the operation of the scheme and to assess [the defendant's] claim of noninvolvement."¹⁴⁰ In *United States v. Johnson*,¹⁴¹ a government agent was allowed to testify as an expert about fraudulent securities schemes. The court noted that "[s]uch evidence helps the jury to understand complex criminal activities, and alerts it to the pos-

138. Edward J. Imwinkelreid & Ephraim Margolin, *The Case for the Admissibility of Defense Testimony About Customary Political Practices in Official Corruption Prosecutions*, 29 Am. Crim. L. Rev. 1, 17-21 (1991).

139. 802 F.2d 344 (9th Cir. 1986).

140. *Id.* at 346.

141. 735 F.2d 1200 (9th Cir. 1984).

sibility that combinations of seemingly innocuous events may indicate criminal behavior."¹⁴²

The reported health care fraud prosecutions reveal an effort by the government to use M.O. expert testimony in only one case. This effort preceded modern evidentiary codes and was unsuccessful. In *Nigro v. United States*,¹⁴³ the defendant, a physician, was convicted on charges of conspiring and selling controlled substances.¹⁴⁴ Evidence at trial showed that in two years, Nigro issued more than 500 prescriptions of morphine sulfate, a controlled substance, to an addict and 485 such prescriptions to the addict's wife. A narcotics agent testified that over a seven-month time period he observed people entering and leaving the defendant's office. According to this witness, these individuals would begin congregating outside of the defendant's office at about 7:45 a.m. and 8:30 a.m., then "they would all make a rush for the elevator and go upstairs, and then come down with their prescriptions and go to the drugstores with them."¹⁴⁵ These people were very "badly emaciated, very nervous, very fidgety."¹⁴⁶ The Eighth Circuit reversed Nigro's narcotics conviction, holding that this M.O. testimony was "extremely prejudicial."¹⁴⁷ Under modern evidentiary codes, with their favorable view of expert testimony, this testimony probably would be allowed if the agent is qualified as an expert and provides reasons for reaching his opinion.

M.O. testimony could be helpful to prosecutors and civil plaintiffs attempting to prove health care fraud. As our health care system has become larger and more complex,¹⁴⁸ it is helpful to understand the relevant billing and reimbursement mechanisms so as to see the mo-

142. *Id.* at 1202.

143. 117 F.2d 624 (8th Cir. 1941).

144. Nigro's conspiracy conviction was reversed by the Eighth Circuit on a technicality. The court found the evidence insufficient to convict Nigro's sole alleged co-conspirator, and because prevailing law failed to recognize a conspiracy of one person, Nigro's conspiracy conviction was set aside "however guilty his own state of mind may have been." *Id.* at 629.

145. *Id.* at 631.

146. *Id.* at 632.

147. *Id.*

148. For a recent recounting of pertinent statistics, see Paul Starr, *The Logic of Health Care Reform* (1992). In 1970, health care spending consumed 7.3% of the GNP; by 1991 it consumed 13.2%. *Id.* at 16. "Since 1980, health care has consumed an additional 1% of GNP every 35 months." *Id.* at 16-17. Today, not only is there a glut of physicians who are specialists, but new types of providers are also proliferating, changing the character of the health care profession from a "traditional, low-key professional ethos to a more entrepreneurial, marketing orientation, aimed in part at stimulating new demands." *Id.* at 17. Currently, there are over 1000 payers that process four billion claims a year to pay hundreds of thousands of providers using different payment methods and billing regulations. United States General Accounting Office, *Health Insurance: Vulnerable Payers Lose Billions to Fraud and Abuse* 13-14 (1992).

tive for the alleged fraud.¹⁴⁹ The "Rx By Fraud" cases demonstrate the need for such understanding. In this common type of health care fraud, providers dispense medically unnecessary prescriptions for controlled substances.¹⁵⁰ To the uninitiated, this activity may appear simply as a medically unsound way for a provider to make money, or perhaps even as a way to be kind: the act of a provider who believes addicts and society are better off if addicts have access to clean, less-toxic drugs than are available on the street. This picture changes, however, if a health care expert explains the M.O. in a corresponding "fee for service" reimbursement system: the prescription given by the "sympathetic" provider is payment to the addicts for access to their bodies. Once these addicts are inside the clinic the quid pro quo takes place. To get the prescription she desires, the addict must allow clinic personnel to conduct diagnostic tests and outpatient procedures.¹⁵¹ Thus, in return for dispensing medically unnecessary prescriptions to addicts, the provider gets to perform and bill insurers thousands of dollars for services rendered.

M.O. testimony may become even more helpful to prosecutors and plaintiffs as health reform takes hold and reimbursement mechanisms become more varied. For example, the M.O. just described would not make sense if patients are covered by a "capitation" method of reimbursement. With "capitation," payment providers are paid a set amount to render all necessary services to covered patients.¹⁵² The provider who renders more than necessary services to patients covered by capitation agreements loses money.¹⁵³ If health care reform

149. See generally Pamela H. Bucy, *Health Care Reform and Fraud By Health Care Providers*, 38 Vill. L. Rev. 1003 (1993) (discussing the relationship between fraud and reimbursement mechanisms) [hereinafter Bucy, *Health Care Reform and Fraud*].

150. See, e.g., *United States v. Larson*, 507 F.2d 385, 389 (9th Cir. 1974) (finding that defendant, a licensed physician, issued drug prescriptions without legitimate medical purposes); *United States v. Jobe*, 487 F.2d 268, 269 (10th Cir. 1973) (upholding conviction of physician charged with distributing controlled substances after a short interview and without conducting a physical examination), *cert. denied*, 416 U.S. 955 (1974).

151. *United States v. Mahar*, 801 F.2d 1477 (6th Cir. 1986) demonstrates this scenario. Shannon Mahar and various relatives owned and operated Inner-City Medical Services. Mahar and others were convicted of "unlawfully selling controlled substances and unlawfully issuing and selling prescriptions for controlled substances, all outside the usual course of medical practice and for no legitimate medical purpose." *Id.* at 1480-81. "Patients" seeking such prescriptions were required to submit "proof of medical insurance and/or Medicaid coverage and submit to medically unnecessary and unwarranted testing procedures in order to obtain controlled substances." *Id.* at 1481. These procedures included: pulmonary function studies, electrocardiograms, urinalysis, X-rays, tuberculosis tests, and cultures. *Id.* As one defendant explained to a "patient," "[i]f you want Talwins you better be X-rayed." *Id.* at 1484.

152. Barry R. Furrow, *The Ethics of Cost-Containment: Bureaucratic Medicine and the Doctor as Patient-Advocate*, 3 Notre Dame J.L. Ethics & Pub. Pol'y 187, 190 (1988) ("The capitation principle means that payment is determined in advance for each subscriber to [an] HMO, and the HMO will lose money if its costs per patient exceed the amount . . . collected.").

153. See *id.*

expands capitation payment, discerning the pattern of fraud committed by the "Rx by Fraud" provider could become difficult. To the uninformed observer, the prescribing pattern of the fraudulent provider may become less suspicious because this provider is no longer conducting numerous tests and procedures on *every* patient. This more discriminating treatment pattern could buttress a defense that the provider orders tests only when necessary for the patients' health, not as a way to line his own pockets. If, however, a health care expert explains the M.O., such as when the provider's treatment and prescription pattern tracks the reimbursement method of the patient at issue such that prescriptions for controlled substances are given and extensive diagnostic tests and procedures are performed only on "fee for service" patients, the fraudulent nature of the provider's conduct becomes more apparent, not less.

D. Conclusion

As the reported health care fraud prosecutions have shown, the expert testimony employed and employable in white collar criminal cases challenges accepted dogma about the proper scope of expert testimony. This testimony raises the following questions: (1) Should expert testimony interpreting and applying complex laws and rules be allowed? (2) Should agents assisting in the investigation be permitted to testify as expert witnesses? (3) If so, should these agents testify as both expert and fact witnesses? and (4) Should extensive M.O. testimony be allowed? Current evidentiary codes, with their emphasis on expanding the limits of expert testimony, would seem to allow these developments. Yet, it may be necessary to employ some safeguards. To prevent usurpation of their role as instructors of the law, courts should restrict as much as possible an expert's opinion to general background information about relevant laws and application of these laws in the abstract. Because of the complexity of many of the transactions and applicable laws in white collar criminal cases, courts should recognize that expert testimony about specific transactions is necessary in such cases if the fact finders are to have a clear understanding of the facts. Although *voir dire* of every expert witness by the trial court prior to allowing an expert witness to testify is not practical, such *voir dire* should take place when the expert witness is providing an interpretation of laws and regulations or when the expert served as part of the investigation or prosecution team. Lastly, prosecutors and defense counsel should seek comparative data reflecting how peer providers of the defendant interpreted and applied relevant rules of law. Such comparisons can provide a check on an expert's opinion, buttressing either the government's or the defendant's case. Under current rules of criminal discovery, however, it is unlikely that defendants routinely would receive such data during discovery. To en-

able defendants to seek effective subpoenas for such data, a limited right to employ interrogatories should be granted to defendants.

III. SUMMARIES

White collar criminal cases, with their hybrid civil/criminal nature,¹⁵⁴ call into question established doctrines regarding the use of summaries and charts. Although some summaries are admissible as evidence and others are not, the health care prosecutions suggest that the courts often fail to make any distinction.

A. "FRE 1006" Summaries Vis à Vis "Pedagogical" Summaries

Federal courts consistently categorize summaries offered by litigants as one of two types: Federal Rule of Evidence ("FRE") "1006" summaries or "pedagogical" summaries.¹⁵⁵ The former are referred to in FRE 1006, which provides that "[t]he contents of voluminous [records] which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation."¹⁵⁶ If the records being summarized are made available to the other parties, or produced in court, it is not necessary that these records be admitted into evidence.¹⁵⁷ Twenty-two states have identical or similar rules.¹⁵⁸

154. See Bucy, White Collar Crime, *supra* note 1, at 3; see also Coffee, *supra* note 1, at 201-21 (discussing the disappearance of any clearly definable line between civil and criminal law); Mann, *supra* note 137, at 332-51 (discussing the procedural aspects of the use of punitive civil sanctions in punishing white collar crime).

155. United States v. Possick, 849 F.2d 332, 339-40 (8th Cir. 1988); Pierce v. Ramsey Winch Co., 753 F.2d 416, 431 (5th Cir. 1985); cf. White Indus., Inc. v. Cessna Aircraft Co., 611 F. Supp. 1049, 1069-70 (W.D. Mo. 1985) (although noting the distinction between "1006" summaries and pedagogical summaries, the court also noted that "some of the summaries in this case partake the nature of both [pedagogical and 1006 summaries]").

156. Fed. R. Evid. 1006.

157. Most courts require only that the underlying records be "capable" of admission into evidence. See, e.g., Ford Motor Co. v. Auto Supply Co., 661 F.2d 1171, 1175 (8th Cir. 1981) (noting that a summary of data drawn from data that is inadmissible must be excluded); United States v. Johnson, 594 F.2d 1253, 1257 n.6 (9th Cir. 1979) (concluding that "the proponent of a summary must demonstrate the admissibility of the underlying writings or records summarized, as a condition precedent to introduction of the summary into evidence under Rule 1006"), *cert. denied*, 444 U.S. 964 (1979). The United States Court of Appeals for the Second Circuit, however, appears to require actual admission of the underlying records. In United States v. Conlin, 551 F.2d 534 (2d Cir. 1977), *cert. denied*, 434 U.S. 831 (1977), the court found error in the use of a summary chart by an IRS Agent because the chart went beyond competent evidence already before the jury. *Id.* at 538. Finding the error to be harmless, however, the court did not reverse the conviction. *Id.* at 539.

158. The following states have adopted rules identical or similar to FRE 1006: Alaska, Alaska R. Evid. 1006; Arizona, Ariz. R. Evid. 1006; Arkansas, Ark. R. Evid. 1006; Colorado, Colo. R. Evid. 1006; Delaware, Del. Uniform R. Evid. 1006; Hawaii, Haw. R. Evid. 1006; Maine, Me. R. Evid. 1006; Michigan, Mich. R. Evid. 1006; Minnesota, Minn. R. Evid. 1006; Montana, Mont. R. Evid. 1006; Nebraska, Neb. R. Evid. 1006; Nevada, Nev. Rev. Stat. Ann. § 52.275 (Michie 1986); New Mexico, N.M. R. Evid. 1006; Ohio, Ohio R. Evid. 1006; Oklahoma, Okla. Stat. Ann. tit., 12 § 3006

According to commentators and courts, unlike a "FRE 1006" summary, a "pedagogical" summary is not evidence, "but only the proponent's organization of the evidence presented."¹⁵⁹ A "pedagogical" summary is based on testimony or documents already admitted into evidence, and "should not be allowed into the jury room without the consent of all parties."¹⁶⁰

Thus, because admissibility of the summary depends on whether it is a "FRE 1006" summary or a "pedagogical" summary, the distinction between the two becomes significant. The problem is that in most white collar crime prosecutions, it is not possible to distinguish between "FRE 1006" summaries and "pedagogical" summaries. In these cases "FRE 1006" summaries are also pedagogical tools. This Article suggests that in white collar criminal cases, the effort to distinguish "FRE 1006" summaries from "pedagogical" summaries should be abandoned and the admissibility of all summaries should be governed by three rules of evidence: FRE 1006, 611(a)¹⁶¹ and 403.¹⁶²

B. *Use of Summaries in Health Care Fraud Prosecutions*

The prosecutions show that while analyzing and approving the use of summaries under FRE 1006, courts treat these summaries as "pedagogical" summaries in three significant ways. First, although FRE 1006 anticipates use of a summary in lieu of admission of voluminous underlying records,¹⁶³ many of the summaries actually approved as

(West. 1978); Oregon, Or. Evid. Code 1006; South Dakota, S.D. Codified Laws Ann. § 19-18-6 (1978); Vermont, Vt. R. Evid. 1006; Washington, Wash. R. Evid. 1006; Wisconsin, Wis. Stat. Ann. § 910.06 (West 1974); Wyoming, Wyo. R. Evid. 1006.

Florida's rule is similar except that it requires timely notice of such evidence. Fla. Stat. Ann. § 90.956 (West 1976).

159. 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 1006[07] (1994) [hereinafter *Weinstein's Evidence*].

160. *Id.*

161. Federal Rule of Evidence 611(a) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Fed. R. Evid. 611(a).

162. Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

163. 5 *Weinstein's Evidence*, *supra* note 159, ¶ 1006[01]; *see also* Nichols v. Upjohn Co., 610 F.2d 293, 293-94 (5th Cir. 1980) (allowing defendant's witness to summarize contents of investigative reports contained in 94,000 page application filed with FDA; witness also allowed to summarize complaints received; underlying records were not introduced but were made available to plaintiff for examination); United States v. Clements, 588 F.2d 1030, 1039 (5th Cir.) (permitting government's expert to testify to calculations of gross revenues based on tapes of 3000 telephone calls which had not been introduced in evidence but were available), *cert. denied*, 440 U.S. 982, and *cert. denied*, 441 U.S. 936 (1979).

"FRE 1006" summaries in fact summarize evidence that has already been admitted. This was true in 100% of the health care fraud cases where courts admitted summaries pursuant to FRE 1006.¹⁶⁴ In criminal cases especially, admission of underlying records may be a poor litmus test for categorizing summaries. It is prudent, if not constitutionally required by the Sixth Amendment's right of confrontation in criminal cases, that all evidence against a defendant be admitted.

The second way courts blended "FRE 1006" summaries and "pedagogical" summaries in the reported health care fraud prosecutions was in the rationale they gave for allowing use of the summary. In each case, the courts referred to the summary as a "FRE 1006" summary, but supplied the admitting rationale for pedagogical tools. The United States Court of Appeals for the Fifth Circuit's explanation is typical: "Examination of the [underlying records] would have been burdensome and time consuming without the aid of summaries."¹⁶⁵

The third way courts blended the two types of summaries in the reported health care prosecutions is in their rulings on admissibility. Although established doctrine holds that "FRE 1006" summaries are admissible and "pedagogical" summaries are not, in approximately fifty percent of the reported health care fraud prosecutions discussing this issue, the courts did not admit into evidence the summaries they otherwise described as "FRE 1006" summaries.¹⁶⁶ In these cases, the

164. *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1660 (1994); *United States v. Duncan*, 919 F.2d 981, 988 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991); *United States v. Campbell*, 845 F.2d 1374, 1381 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988); *United States v. Gold*, 743 F.2d 800, 816 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *State v. Marshall*, 606 P.2d 278, 280 (Wash. Ct. App. 1980). The opinions in the subsequent two cases do not directly state that the charts were based on evidence in the record but imply that they were. In *United States v. Behrens*, 689 F.2d 154, 157, 161 (10th Cir.), *cert. denied*, 459 U.S. 1088 (1982), the court referred to the "evidence" upon which the chart was based and detailed what this evidence was. *Id.* at 157, 161. In *United States v. Seelig*, 622 F.2d 207, 214-15 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980), two charts were admitted in the trial below. The appellate court held that admission of one chart was proper. *Id.* at 214. This chart was based on exhibits admitted into evidence. *Id.* The appellate court held that admission of the second chart was in error because of poor foundation for the comparison of pharmacies detailed in the chart. *Id.* at 215. The court also noted that "[t]he underlying records on which [this chart was] based were not exhibits nor were they made available to appellants." *Id.* This comment further implied that the exhibits on which the prior chart were based were admitted.

165. *Duncan*, 919 F.2d at 988.

166. The summary chart was not admitted into evidence in *Duncan*, 919 F.2d at 988, or in *Seelig*, 622 F.2d at 215. Although not completely clear, it appears that the summary charts were not admitted in *Campbell*, 845 F.2d at 1381. The court refers to the "limiting" instruction given. *Id.* If this reference is to the usual instructions given to a jury regarding summary charts, *see infra* note 167, then this chart was not admitted into evidence. Summary charts were held to be properly admitted into evidence in *Console*, 13 F.3d at 657, *Gold*, 743 F.2d at 816, and *Marshall*, 606 P.2d at 280. *Behrens*, 689 F.2d at 154, however, does not state whether the summary chart was admitted into evidence.

juries were specifically instructed that the summary was not evidence and was not admissible.¹⁶⁷

*United States v. Duncan*¹⁶⁸ exemplifies this blending of "FRE 1006" and "pedagogical" summaries. Duncan and his wife were indicted as co-conspirators in a scheme to defraud insurance companies for feigned injuries acquired in staged automobile accidents.¹⁶⁹ An FBI Agent was permitted to "summarize . . . voluminous insurance company records," which had already been introduced into evidence.¹⁷⁰ The Fifth Circuit upheld the agent's testimony and his use of charts, citing both the rationale of "FRE 1006" and "pedagogical" summaries. First, "FRE 1006" summaries were allowed because "[t]he underlying records were indisputably voluminous, consisting of hundreds of exhibits. Examination of the individual records would have been burdensome and time-consuming without the aid of summaries."¹⁷¹ Second, the court commented on the rationale for pedagogical tools: "Furthermore, the prosecutor used the summaries in part to show the recurring pattern of hospital admissions among a large group of conspirators. We cannot rationally expect an average jury to . . . create sophisticated flow charts to reveal patterns that provide important inferences about the defendants' guilt."¹⁷²

Lastly, although FRE 1006 would allow admission of the summary charts as well as the summary testimony, despite the fact that the *Duncan* court specifically approved of the testimony and use of charts under FRE 1006, it noted with approval the jury instruction that "these charts are not evidence."¹⁷³

Blending "FRE 1006" summaries and pedagogical devices is not unique to health care fraud prosecutions. Four of the health care fraud prosecutions cite *United States v. Scales*¹⁷⁴ as support for the use

167. For example, the jury in *Duncan* was instructed as follows:

Ladies and gentlemen, these charts are not evidence. They are data compilations which [the agent] says he has summarized from the evidence already admitted into the record. If you find that these summaries do not comport with the evidence admitted, you are instructed to disregard any summary that is not supported by the evidence admitted into the record.

919 F.2d at 988.

168. *Id.* at 981.

169. *Id.* at 984-85.

170. *Id.* at 988.

171. *Id.*

172. *Id.*

173. *Id.* The treatment of the summary chart in *United States v. Campbell*, 845 F.2d 1374, 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988), for example, is similar. The court gave a pedagogical rationale for allowing use of the chart: "Without the chart . . . [the] technical information [it summarized] . . . may not have been readily understandable." *Id.* at 1381. Moreover, in *Campbell*, the summary chart summarized evidence already introduced. *Id.*

174. 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979).

of the summaries at issue.¹⁷⁵ Judge Weinstein cited *Scales* as an example of courts improperly interpreting FRE 1006 to apply to “pedagogical” summaries.¹⁷⁶ In *Scales*, the defendant was convicted of unlawfully converting to his own use assets of the union and conspiring to do so.¹⁷⁷ The United States Court of Appeals for the Sixth Circuit affirmed the government’s use of a series of charts.¹⁷⁸ One chart summarized the indictment.¹⁷⁹ Other charts referred to a count or overt act charged in the indictment and summarized documentary proof relating to it and already admitted into evidence.¹⁸⁰ In ruling that this use of charts was proper under FRE 1006, the court gave a pedagogical rationale. It noted that the “summary of the indictment clearly was intended to aid the jury in organizing the proof” and that without the charts, “comprehension of the exhibits would have been difficult.”¹⁸¹

Are all the courts that have blended the characteristics of “FRE 1006” summaries with pedagogical tools wrong? On the contrary, the courts that have blended the characteristics of “FRE 1006” summaries and “pedagogical” summaries are struggling with the fact that at least in white collar criminal cases, the distinction between “FRE 1006” summaries and “pedagogical” summaries is artificial. The prosecutor in a white collar criminal case, more than in any other criminal case, is a teacher. The prosecutor must educate the fact finders about businesses or transactions they may have never known of, dealt with, or understood. The prosecutor must organize voluminous bits of evidence that inevitably come to the fact finder in a jumbled and disorienting manner. The prosecutor who cannot accomplish this cannot prove facts beyond a reasonable doubt. If a jury cannot understand a case, they cannot and should not convict. Yet, this pedagogical role requires pedagogical tools. Although courts are correct in recognizing the pedagogical characteristics of summaries used in white collar criminal cases, they are incorrect in limiting the use of such summaries because they have pedagogical characteristics.

175. The cases referring to *Scales* are: *Duncan*, 919 F.2d at 988; *Campbell*, 845 F.2d at 1381; *United States v. Behrens*, 689 F.2d 154, 161 (10th Cir.), *cert. denied*, 459 U.S. 1088 (1982); *United States v. Seelig*, 622 F.2d 207, 214 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980). Although *United States v. Gold*, 743 F.2d 800, 816 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985), does not explicitly cite to *Scales*, it relies on *United States v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978), as support for admission of the summary chart, and *Scales* relies on *Evans*. *Scales*, 594 F.2d at 562.

176. 5 Weinstein’s Evidence, *supra* note 159, ¶ 1006[07] n.4. Weinstein and Berger also identify *Evans* as improperly interpreting FRE 1006 to apply to “pedagogical” summaries. *Id.*

177. *Scales*, 594 F.2d at 560.

178. *Id.* at 561-65.

179. *Id.* at 561.

180. *Id.*

181. *Id.* at 562.

This is not to say there are no problems in admitting summaries, of whatever kind. Summaries may encourage jurors to substitute an evaluation of the credibility of the summary or its authenticating witness for the credibility of the underlying witness(es) or exhibits(s). Also, summaries may overemphasize some testimony or some exhibits. In addition, jurors may tend to treat summaries as additional evidence or corroborative of other evidence. Lastly, authentication of summaries may allow their proponent the equivalent of an additional closing argument through the summary.¹⁸² Interestingly, these dangers arise most clearly when the records being summarized have already been introduced into evidence: a situation apparently not envisioned by FRE 1006, but uniformly occurring in the reported health care fraud prosecutions where summaries were used.

To accommodate the interests of all parties, admissibility and use of summaries in white collar criminal cases should be governed by FRE 1006, which permits admission of summaries if other evidentiary rules are met; FRE 403, which prohibits admission of evidence if its opponent proves that its prejudicial impact "substantially outweighs" its probative value;¹⁸³ and, FRE 611(a), which requires a court to ensure that evidence is presented effectively "for the ascertainment of truth," and to "avoid needless consumption of time."¹⁸⁴

Five important factors should be used to analyze summaries, and should take into account the concerns underlying FRE 403 and FRE 611(a). First, are the summaries based upon evidence that has been admitted? If not, is the defendant's right to confront his accusers being compromised? Second, are the summaries fair, non-biased and non-prejudicial reflections of testimony and exhibits? Third, are the summaries helpful to the fact finder in organizing or understanding evidence that is difficult to organize or understand without the summaries? Fourth, does the probative value of the summaries outweigh their prejudicial impact? In evaluating this question, courts should be sensitive both to the dangers of summaries—buttressing credibility or overemphasizing some evidence—and to the government's special need for summaries in complex cases. Fifth, should special attention be given to "pedagogical" summaries that are authenticated and presented by an expert witness, especially a case agent testifying as an expert witness?

The last factor is particularly important. First, the credentials of the expert may enhance the existing dangers of summary evidence. Second, the expert's credibility on issues within his expertise may be amplified simply because the expert is supplying a grateful jury with a

182. See *United States v. Lemire*, 720 F.2d 1327, 1349 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Conlin*, 551 F.2d 534, 538-39 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977).

183. FRE 403 is set forth in full *supra* note 162.

184. FRE 611(a) is set out in full *supra* note 161.

complete and coherent summary of the case. All of the dangers for the defense presented by government agents as experts are possible,¹⁸⁵ of course, if the expert is a case agent or part of the case "team."¹⁸⁶ *United States v. Gold*¹⁸⁷ exemplifies a combination of summary and expert evidence. Gold, an optometrist, along with his eye clinic and several of the clinic's employees, was convicted on multiple fraud charges stemming from false claims submitted to Medicare.¹⁸⁸ Their convictions were affirmed on appeal.¹⁸⁹ One of the issues on appeal concerned a summary chart introduced by the government pursuant to FRE 1006. The forty-page chart contained fifteen columns of information. The first thirteen columns summarized testimony and exhibits already admitted. The last two columns consisted of the opinion of the witness authenticating the chart. This witness served as part of the case investigating team and was qualified as an expert on medicare coverage.¹⁹⁰

The fact that summary evidence presented by an expert who also served as a case agent presents triple potential for prejudice does not mean that such testimony should never be allowed. Efficiency and coherence may be well served by such a witness. There are, however, several steps that can be taken to alleviate the potential for prejudice. The most dramatic step is requiring the proponent of the "summary-expert-case agent" witness to divide the functions of summarizing evidence and providing expert opinion testimony between two witnesses. A less dramatic step is giving jury instructions that carefully delineate the multiple roles of this witness and clarify the weight to be accorded the various aspects of her testimony.

C. Conclusion

White collar criminal cases, as demonstrated by the reported health care fraud prosecutions, often include summaries as evidence. These summaries bear indicia of "FRE 1006" summaries: they are designed to summarize voluminous information that is inconvenient to review in court. They also bear indicia of "pedagogical" summaries: they are designed to help fact finders organize the evidence that has been admitted. When courts exclude summaries from evidence because they are "pedagogical summaries," they ignore the dual character of summaries. Rather than holding fast to a rule that pedagogical tools are never admissible into evidence, courts should determine the admissibility of summaries in a manner that recognizes their multiple pur-

185. See *supra* text accompanying notes 117-34.

186. See *supra* part II.B.3.

187. 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985).

188. *Id.* at 805-120.

189. *Id.*

190. *Id.* at 816.

poses, the dangers they present to defendants, and the important function they serve to plaintiffs.

IV. EXTRINSIC ACT EVIDENCE

The most often cited rule of evidence,¹⁹¹ FRE 404(b),¹⁹² addresses the difficult question of whether a jury should hear bad acts a party or witness may have done other than those alleged in the case before it. FRE 404(b) forbids use of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he or she acted in conformity therewith."¹⁹³ Such evidence is admissible, however, to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."¹⁹⁴ All fifty states have adopted a FRE 404(b) analog.¹⁹⁵ Federal and state courts interpret these extrinsic act evidence rules broadly, moving one commentator to suggest that an "imaginative prosecutor" can get any extrinsic evidence admitted.¹⁹⁶ Extrinsic act evidence can divert a trial into collateral issues; waste the time of the court, jury, and litigants; catch one party by surprise; and, make it humanly impossible to judge a party's liability or guilt solely on issues in the trial.¹⁹⁷ On the other hand, proof of conduct by the defendant similar to that at issue in trial can be highly relevant and illuminating of the truth.¹⁹⁸

Because of the type of defense often used in white collar criminal cases, these cases are prime candidates for use of extrinsic act evi-

191. Edward J. Imwinkelreid, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 Vill. L. Rev. 1465, 1467 (1985) [hereinafter *Amending 404(b)*].

192. Fed. R. Evid. 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice or good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

193. *Id.*

194. *Id.*

195. See 2 Weinstein's Evidence, *supra* note 159, ¶ 404[21] for a detailed discussion of how the rules in the states compare to FRE 404(b).

196. Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777, 799 (1981); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 Iowa L. Rev. 579, 579 (1985) ("[A]n inventive prosecutor will almost always succeed in devising a theory that will support the admissibility of the accused's extrinsic antisocial act.").

197. Kuhns, *supra* note 196, at 810; M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325, 349-50 (1956).

198. See Weissenberger, *supra* note 196, at 581; H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. Pa. L. Rev. 845, 882 (1982).

dence. The reported health care fraud prosecutions exemplify this point. Extrinsic act evidence, introduced by the government in over eleven percent of the reported health care fraud prosecutions,¹⁹⁹ is the fifth most used type of evidence.²⁰⁰

Not only is extrinsic act evidence highly relevant in white collar criminal cases, it is also widely available. Because the conduct at issue in white collar crime often is subject to heavy regulation,²⁰¹ there are multiple civil and administrative actions that track the criminal case.²⁰² The preparation, litigation, and resolution of these parallel cases can yield documented details of extrinsic act evidence. Both *United States v. Blanton*²⁰³ and *United States v. Lennartz*²⁰⁴ exemplify the use of extrinsic act evidence that originated from the monitoring efforts of regulatory agencies. In *Blanton*, the routine monitoring of purchases of methaqualone followed by an agency field audit ultimately led to the indictment and conviction of a physician for distributing controlled substances through improper prescription practices.²⁰⁵ At Blanton's trial, the government introduced a variety of extrinsic act evidence gathered in these earlier administrative audits and investigations, such as Blanton's unorthodox "research" on marijuana and his supplying a narcotic to his wife who died of an overdose.²⁰⁶ In *Lennartz*, the defendant, a commercial ambulance service operator, was convicted on six counts of fraud arising from claims submitted to Indiana's Medicaid program.²⁰⁷ Extrinsic act evidence obtained in audits of the defendant's prior businesses was admitted.²⁰⁸ Investigators who had conducted these audits testified about the billing irregularities they had investigated in these prior businesses and the discussions they had had with the defendant or his colleagues.²⁰⁹ This evidence was admitted pursuant to Rule 404(b) to demonstrate that the defendant "had knowledge of proper and improper Medicaid billing practices."²¹⁰

199. See *supra* chart 4 & *infra* appendix IV.

200. As shown *supra* in chart 4, extrinsic act evidence is the fifth most common type of evidence used in health care fraud prosecutions after insider information, documents, medical experts and undercover agent information.

201. *White Collar Crime: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess., pt. 1, at 29 (1986); Hazel Croall, *White Collar Crime*, *Criminal Justice and Criminology* 78-84 (1992); Herbert Edelhertz & Charles Rogovin, *A National Strategy For Containing White-Collar Crime* 4 (1980).

202. *Fraud By Fright*, *supra* note 5, at 871-74 (discussing civil and administrative actions that track criminal cases, specifically highlighting those available to pursue the fraudulent health care provider).

203. 730 F.2d 1425 (11th Cir. 1984).

204. 948 F.2d 363 (7th Cir. 1991).

205. *Blanton*, 730 F.2d at 1427.

206. *Id.* at 1432.

207. *Lennartz*, 948 F.2d at 364.

208. *Id.* at 366-67.

209. *Id.* at 368.

210. *Id.*

In addition to the helpfulness of extrinsic act evidence to the prosecutor and the government's easy access to such evidence, other observations about the extrinsic act evidence used in the reported health care fraud prosecutions can be made. First, the most common ground for admission of such evidence is its relevance in proving intent. Second, improper admission of extrinsic act evidence is the most frequently cited evidentiary error necessitating reversal. Third, the extrinsic act evidence admitted has been of questionable similarity to the charged conduct. Fourth, the proponent of extrinsic act evidence has been accorded considerable leeway in diverting the trial from the charged conduct. Fifth, the few courts that have addressed the burden of proof issue place the burden on the proponent of extrinsic act evidence to show that its probative value outweighs its prejudicial impact.

This survey of the use of extrinsic act evidence acknowledges the necessary role of extrinsic act evidence in health care fraud prosecutions in particular and in white collar criminal cases in general. Because of its substantial dangers and its especially high level of usage in white collar criminal cases, however, this Article suggests steps that should be taken by legislatures and courts to neutralize the potential for unfairness in the admission of extrinsic act evidence.

A. *Grounds For Admission*

The health care fraud prosecutions are consistent with most extrinsic act cases in admitting such evidence as relevant to intent.²¹¹ In the health care fraud prosecutions, like many white collar criminal cases, a defendant's conduct often is documented unequivocally in a paper trail, leaving intent as one of the few viable defenses.²¹² Variations on this defense include: the defendant was unaware that his associates were engaged in such conduct;²¹³ the defendant did not intend to engage in such conduct;²¹⁴ or the defendant was unaware that his or her conduct violated the law.²¹⁵ These "lack of intent" defenses become

211. See 2 Weinstein's Evidence, *supra* note 159, ¶ 404[12].

212. Bucy, White Collar Crime, *supra* note 1, at 186.

213. See, e.g., *People v. Alizadeh*, 452 N.Y.S.2d 425, 430-31 (App. Div. 1982) (reversing defendant's conviction, in part, because the billing in question was done by one of the defendant's employees and that he did not instruct his employees how to bill and relied on his employees who were authorized to sign his name to claim forms).

214. See, e.g., *United States v. George*, 477 F.2d 508, 511-12 (7th Cir.) (involving defendant purchasing agent of Zenith Corporation who argued that he did not intend to exercise favoritism to Zenith's supplier of stereo cabinets), *cert. denied*, 414 U.S. 827 (1973).

215. See, e.g., *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986) (affirming conviction of defendant for mail fraud, despite his argument that his conduct did not constitute mail fraud), *rev'd sub nom. McNally v. United States*, 483 U.S. 350, 361 (1987) (dismissing the mail fraud charges for which defendant was convicted, finding the conduct did not constitute mail fraud).

especially viable when the conduct at issue concerns complex and heavily regulated transactions.

Once a "lack of intent" defense is invoked, proof of similar prior conduct by the defendant to prove intent becomes particularly relevant.²¹⁶ Courts apparently consider the difficulty in proving cases when considering the admissibility of extrinsic act evidence. As one court noted in weighing the probative value and prejudicial impact of extrinsic act evidence and ruling in favor of admission: "The probative value was great: the government had little evidence on intent, which made this evidence near essential"²¹⁷

B. Reversals

There were more reversals for trial courts' admission of extrinsic act evidence in the reported health care fraud prosecutions than for any other evidentiary ruling by lower courts.²¹⁸ In some of the cases, the reversal was due to sloppiness on the part of the proponent of the evidence in laying a proper foundation. *State v. Jacobs*²¹⁹ demonstrates this. Jacobs, a physician, was convicted of obtaining percodan, a narcotic, "by means of deceit and subterfuge."²²⁰ The evidence showed that Jacobs wrote a prescription for percodan for one of his patients, then purchased the drug back from her after she acquired it. The extrinsic act evidence consisted of testimony that this same patient had earlier refused a similar request from the defendant.²²¹ The appellate court found that this extrinsic act evidence was improperly admitted because the prosecutor failed to introduce the earlier prescription into evidence or show that it was a narcotic or even a prescription drug.²²²

In other cases, appellate courts have held that the extrinsic act evidence was simply too prejudicial.²²³ The opinion of the Eighth Circuit

216. See, e.g., *United States v. Campbell*, 845 F.2d 1374, 1380 (6th Cir.) (finding that extrinsic act evidence was properly admitted because the defendant's "primary defense was that he had acted in good faith, and both knowledge and intent are elements of [the] offenses [with which the defendant was charged]"), *cert. denied*, 488 U.S. 908 (1988).

217. *United States v. Jackson*, 761 F.2d 1541, 1543 (11th Cir. 1985).

218. See *supra* chart 6 & *infra* appendix VI.

219. 503 P.2d 826 (Ariz. Ct. App. 1972).

220. *Id.* at 827.

221. *Id.* at 828.

222. *Id.* at 828-29.

223. See, e.g., *Lambert v. United States*, 101 F.2d 960, 964 (5th Cir. 1939) (finding prejudice in the introduction of "evidence of similar acts committed at or about the same time with the fraudulent purpose . . . [that] was without relevance to the change for which [the defendant] was on trial."); *People v. Alizadeh*, 452 N.Y.S.2d 425, 433-35 (App. Div. 1982) (finding reversible error where trial court had allowed prosecutor, during cross examination, to ask the defendant numerous questions, which had the cumulative effect of prejudice to the defendant); cf. *MacLafferty v. United States*, 77 F.2d 715, 719-20 (9th Cir. 1935) (reversing conviction because jury instructions

in *Neill v. United States*²²⁴ is typical. In *Neill*, the government offered into evidence hearsay testimony from addicts who allegedly purchased controlled substances from the defendant, a physician. The government presented this testimony to demonstrate why it used undercover techniques to investigate the defendant.²²⁵ The court held that such evidence was unwarranted because entrapment was never offered as a defense and was sufficiently prejudicial to require a reversal.²²⁶

C. *Prior Convictions as Extrinsic Acts*

Although FRE 404(b) and most state codifications of extrinsic act evidence rules contemplate admission of "other crimes" as well as "wrongs or acts," no prior convictions were admitted as extrinsic act evidence in the reported health care fraud prosecutions. By comparison, the extrinsic act evidence in many street crimes consists of prior convictions.²²⁷ The difference may be due to higher recidivism among street criminals than white collar criminals, leaving street criminals with more prior convictions available.²²⁸ Conversely, white collar criminals may be as recidivistic as other criminals, just more fortunate that fewer of their prior violations of the law are detected and prosecuted.

D. *Similarity of Extrinsic Acts and Charged Conduct*

One of the criteria courts focus on in deciding whether to admit extrinsic act evidence is how similar such acts are to the charged conduct.²²⁹ In many of the health care fraud prosecutions, the extrinsic

included evidence of other crimes that was not admissible, except where the prosecution was proving specific intent).

224. 225 F.2d 174 (8th Cir. 1955).

225. *Id.* at 176.

226. *Id.* at 180.

227. See, e.g., *United States v. Rubio-Estrada*, 857 F.2d 845, 846-49 (1st Cir. 1988) (holding that evidence of defendant's prior conviction for possessing cocaine with intent to distribute was properly admitted at trial on the same charges); *United States v. Hutchins*, 818 F.2d 322, 328-29 (5th Cir. 1987) (holding that evidence of defendant's prior conviction of possession of marijuana with intent to distribute was held properly admitted in trial on charges of conspiracy and attempting to possess marijuana with intent to distribute), *cert. denied*, 484 U.S. 1041 (1988); *United States v. Naylor*, 705 F.2d 110, 111-12 (4th Cir. 1983) (holding that evidence of defendant's prior convictions for attempted theft of a motor vehicle was properly admitted in his trial on charges of interstate transportation of a stolen motor vehicle).

228. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 569, 667 (1992); see also Joseph T. Wells, *Six Common Myths About Fraud*, J. Acct., Feb. 1990, at 82, 88 (stating that "[d]ata suggest that white-collar offenders have the lowest rate of recidivism of all criminals").

229. See, e.g., *United States v. Mills*, 895 F.2d 897, 907 (2d Cir.) (noting that Federal Rule of Evidence 404(b) allows evidence of similar acts to prove a "signature crime"), *cert. denied*, 495 U.S. 951 (1990); *United States v. Lewis*, 837 F.2d 415, 419 (9th Cir.) (stating that evidence of prior acts is admissible to prove intent when "the prior act is similar and close enough in time to be relevant"), *cert. denied*, 488 U.S. 923 (1988); *United States v. Beechum*, 582 F.2d 898, 909-14 n.15 (5th Cir. 1978) (stating that

act evidence was quite similar to the charged conduct, often consisting of the same type of falsifications as are alleged in the indictment, just with other patients.²³⁰

In some cases, however, the similarity was not as great. In *United States v. Blanton*,²³¹ for example, where the defendant, a physician, was convicted for distributing methaqualone to patients through fraudulent prescriptions,²³² extrinsic act evidence of the defendant's forced resignation from two hospitals and the defendant's unorthodox research with marijuana was admitted.²³³ In *State v. Chenette*,²³⁴ where the defendant, a physician, was convicted for filing false Medicaid claims,²³⁵ testimony from patients about the poor quality of care they received from the defendant was held to be properly admitted under Vermont Rule of Evidence 404(b).²³⁶ In *United States v. Hooshmand*,²³⁷ where the defendant, a physician, was convicted for improper electromyography ("EMG") billings,²³⁸ evidence that the defendant instructed employees to bill his private tennis lessons as EMG services was held to be properly admitted pursuant to FRE 404(b).²³⁹ *State v. Carr*²⁴⁰ presents an especially questionable dissimilarity between the extrinsic act evidence and the charged conduct. Carr, a physician, was convicted for trafficking and distributing controlled substances through fraudulent prescriptions.²⁴¹ The government was allowed to introduce evidence of the defendant's intimate sexual contacts with two of his patients and the drug habits and deaths

"where the evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged"), *cert. denied*, 440 U.S. 920 (1979); see also 2 Weinstein's Evidence, *supra* note 159, ¶ 404[12] (stating that "[c]ourts often stress the similarity of the charged and uncharged acts, and sometimes go so far as to say that in order to be probative the offense must be similar to the charged act in the sense that the essential physical elements of the two crimes must be alike" and discussing how the degree of similarity required seems to vary, depending on the type of case at issue).

230. See, e.g., *United States v. Sherer*, 653 F.2d 334, 338 (8th Cir.) (finding that extrinsic act evidence included billings identical to those in the indictment, but for different months), *cert. denied*, 454 U.S. 1034 (1981); *State v. Romero*, 574 So. 2d 330, 336 (La. 1990) (finding that extrinsic act evidence included evidence of billing improprieties similar to the Medicaid billings included in the indictment but concerned non-Medicaid patients); *State v. Young*, 406 S.E.2d 758, 776-77 (W. Va. 1991) (finding that extrinsic act evidence included prescriptions of controlled substance similar to those in the indictment but for different patients).

231. 730 F.2d 1425 (11th Cir. 1984).

232. *Id.* at 1427.

233. *Id.* at 1432.

234. 560 A.2d 365 (Vt. 1989).

235. *Id.* at 367.

236. *Id.* at 372.

237. 931 F.2d 725 (11th Cir. 1991).

238. *Id.* at 730.

239. *Id.* at 736.

240. 626 P.2d 292 (N.M. Ct. App.), *cert. denied*, 625 P.2d 1186 (N.M.), *cert. denied*, 454 U.S. 853 (1981), *overruled by* 879 P.2d 92 (N.M. Ct. App. 1994).

241. *Id.* at 295.

of these patients.²⁴² Over a strenuous dissent,²⁴³ this evidence was held to be properly admissible as relevant to the defendant's intent: "[This evidence] tended to show that defendant's actions were not taken for a legitimate medical purpose and thus his intent was to act outside the course of his professional practice."²⁴⁴

Related to the issue of similarity between the extrinsic act evidence and charged conduct is the extent to which a trial is diverted by the extrinsic act evidence. In many of the health care fraud prosecutions, the proponent of the extrinsic act evidence was allowed considerable leeway in presenting this evidence. In *Carr*, ten witnesses testified about the extrinsic act evidence.²⁴⁵ In *United States v. Jackson*,²⁴⁶ detailed extrinsic act evidence was presented by an FBI agent who had posed as a patient of the defendant's in a fraud scheme unrelated to the scheme for which the defendant was on trial.²⁴⁷ In addition to the agent's testimony, a tape recording surreptitiously made of the transaction by the government was also introduced into evidence.²⁴⁸ In other cases, four,²⁴⁹ three,²⁵⁰ and two²⁵¹ witnesses were allowed to testify about the extrinsic act evidence.

The amount of diversion permitted in presenting the extrinsic act evidence in the reported health care fraud prosecutions is rarely seen in trials of street crimes. Usually, in trials of street crimes the extrinsic act evidence is simple, consisting of testimony from one witness or simply the introduction of a prior conviction.²⁵² In white collar criminal cases the extrinsic acts, like the charged conduct, more often con-

242. *Id.* at 303-04; *id.* at 308-09 (Lopez, J. dissenting).

243. *Id.* at 306-10 (Lopez, J. dissenting).

244. *Id.* at 304.

245. *Id.* at 304.

246. 761 F.2d 1541 (11th Cir. 1985).

247. *Id.* at 1543 n.1.

248. *Id.*

249. *United States v. Lennartz*, 948 F.2d, 363, 366-67 (7th Cir. 1991) (four witnesses testifying regarding the defendant's past Medicaid billing abuses as a subtext for showing the defendant was aware of Medicaid regulations, and thus, acted intentionally in violating the regulations).

250. *United States v. Chenette*, 560 A.2d 365, 371-72 (Vt. 1989) (three witnesses testifying about instances of fraud for which no charges had been brought and various patients testified that they were dissatisfied with the defendant's medical care and would not go to him after an initial visit).

251. *United States v. Campbell*, 845 F.2d 1374, 1380 (6th Cir.) (two witnesses testifying that their treatments were not performed and not necessary, respectively, in a Medicare fraud case), *cert. denied*, 488 U.S. 908 (1988).

252. *See, e.g., United States v. Mehrmanesh*, 689 F.2d 822, 830-33 (9th Cir. 1982). The court admitted three types of extrinsic act evidence, two of which are provable with little or no diversion from proof regarding the charged offenses: (1) a prior conviction for smuggling hashish; (2) seizure of drugs and drug use paraphernalia from a search of defendant's residence wherein evidence of the charged offense was also found. Although the court did not go into detail, the third type of extrinsic act evidence, defendant's "numerous sales of heroin before and after his arrest," may have required testimony by witnesses additional to those needed to prove the charged offenses. *Id.*

sist of complex financial transactions. In *United States v. Lennartz*,²⁵³ for example, where the extrinsic act evidence consisted of events occurring in prior audits, a Medicaid auditor and investigator testified about the scope, findings, results, and conversations relating to the prior audits.²⁵⁴ In *United States v. Campbell*,²⁵⁵ former patients of the defendant testified about the treatment they received from the defendant and their conversations with him.²⁵⁶ In *State v. Chenette*,²⁵⁷ three former patients of the defendant testified and their related medical records and Medicaid claims were introduced.²⁵⁸

E. Probative Value Versus Prejudicial Impact

Federal Rule of Evidence 403 specifies that otherwise relevant evidence may be excluded if its probative value is "substantially outweighed" by its prejudicial impact.²⁵⁹ Following the "inclusionary" emphasis in the federal evidentiary code, this rule places the burden of persuading courts that evidence should be excluded on the opponent of such evidence.²⁶⁰ Since 1988, however, it has been clear that a Rule 403 analysis is to be conducted prior to admitting any evidence pursuant to Rule 404(b).²⁶¹ Although the language of the federal rules places the burden of proving that the prejudicial impact substantially outweighs the probative value of evidence on the opponent of evidence,²⁶² federal courts have switched the burdens when the evidence is of extrinsic acts.²⁶³ Most of the courts delivering opinions in the health care fraud cases did not address the issue of which party bears the burden of proof on the Rule 403 analysis regarding extrinsic act evidence, but the few that did similarly placed the burden on the proponent of the extrinsic act evidence.²⁶⁴ This is the appropriate allocation of this burden.

253. 948 F.2d 363 (7th Cir. 1991).

254. *Id.* at 366-67.

255. 845 F.2d 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988).

256. *Id.* at 1377-81.

257. 560 A.2d 365 (Vt. 1989).

258. *Id.* at 371-72.

259. See *supra* note 162 for text of Fed. R. Evid. 403.

260. *Amending 404(b)*, *supra* note 191, at 1467.

261. In 1988, the Supreme Court held that a Rule 403 assessment of whether probative value is outweighed by prejudicial impact should precede introduction of 404(b) extrinsic act evidence. *Huddleston v. United States*, 485 U.S. 681, 691 (1988).

262. *Amending 404(b)*, *supra* note 191, at 1471-84.

263. See, e.g., *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982) ("Once its relevancy is shown, the [extrinsic act] evidence is admissible only after the Government demonstrates to the trial court that, on balance, its probative value is not substantially outweighed by the danger of unfair prejudice to the defendant.").

264. See *United States v. Hooshmand*, 931 F.2d 725, 736 (11th Cir. 1991); see also *United States v. Neely*, 980 F.2d 1074, 1079 (7th Cir. 1992) (holding that evidence that defendant was involved in another insurance fraud scheme was properly admitted because the government provided clear and convincing evidence to prove all elements of the crime charged); *State v. McDermitt*, 406 So. 2d 195, 200 (La. 1981) (stating that

Professor Imwinkelreid has argued that with extrinsic act evidence, the proponent of such evidence should bear the burden of proving that the probative value outweighs the prejudicial impact of such evidence.²⁶⁵ Imwinkelreid offers three reasons for his suggestion. First, he warns of the danger of such evidence in that jurors may tend to think "once a crook, always a crook."²⁶⁶ Second, he cites the fact that Rule 609, which allows use of prior convictions to impeach witnesses, imposes the Rule 403 burden on the proponent. In this respect, Imwinkelreid argues that imposing the Rule 403 burden on proponents of extrinsic act evidence, which does not necessarily include a prior conviction, is even more necessary than it is with Rule 609 prior convictions. He suggests that juries may judge extrinsic act evidence more harshly because the defendant has not yet been punished for it through a prior conviction.²⁶⁷ Finally, Imwinkelreid suggests that courts are imposing this burden on the proponent of extrinsic act evidence anyway, thereby reverting to the common law, which undercuts the authority of the Federal Rules of Evidence.²⁶⁸

In white collar criminal cases, there are additional reasons for imposing the Rule 403 burden on the proponent of extrinsic act evidence. First, as noted, in these cases the extrinsic act evidence is less likely to be misconduct that has resulted in a conviction.²⁶⁹ Thus, this extrinsic act evidence has never been subjected to the rigorous "beyond a reasonable doubt" burden of proof. Instead, pursuant to Rule 404(b), such extrinsic acts must be proven simply by a preponderance of the evidence. Second, the courts tend to allow a fair amount of diversion to present the extrinsic act evidence;²⁷⁰ an advantage for the proponent that can be "evened-up" by also requiring the proponent to shoulder the Rule 403 burden of proof. Third, the broad use of expert and summary testimony in white collar criminal cases²⁷¹ may elevate the significance of extrinsic act evidence if such evidence is integrated with the charged conduct to yield the expert's opinion or contribute to the summary.²⁷² *State v. Young*²⁷³ demonstrates this. Young, a den-

the "[p]rerequisite to the admissibility of [extrinsic act] evidence is a showing by the state that the evidence . . . is not merely repetitive and cumulative . . . and that it serves the actual purpose for which it is offered"). The court in *United States v. Sherer*, 653 F.2d 334 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981), also appears to place this burden on the proponent of such evidence: "Before the [extrinsic act] evidence can be admitted, however, it must be shown that an issue on which other-crime evidence may be received is raised, the proffered evidence is relevant to that issue, the evidence is clear and convincing, and the probative worth outweighs the probable prejudicial impact." *Id.* at 338-39.

265. *Amending 404(b)*, *supra* note 191, at 1487-91.

266. *Id.* at 1488.

267. *Id.* at 1490.

268. *Id.* at 1491-92.

269. *See supra* text accompanying notes 227-28.

270. *See supra* text accompanying notes 229-59.

271. *See supra* text accompanying notes 68-190.

272. *See supra* text accompanying notes 117-34.

tist, was convicted of "felonious constructive delivery" of controlled substances as a result of prescriptions he issued that were not for legitimate dental purposes.²⁷⁴ Extrinsic act evidence was admitted regarding improper prescriptions for controlled substances dispensed by the defendant to patients other than those named in the charges.²⁷⁵ The government's expert witness considered this extrinsic act evidence as well as the evidence regarding the charges in reaching his opinion that the defendant "was engaged primarily in a 'prescription writing' business."²⁷⁶ Finally, the reason that the Rule 403 burden should be imposed upon the proponent of such evidence is that imposing it will not be unreasonable or difficult. As the reported health care fraud cases reveal, the government is the proponent of extrinsic act evidence most of the time.²⁷⁷ Through its regulatory machinery, the government has access to extrinsic act evidence and the information necessary to lay a proper foundation for such evidence.

F. Conclusion

This section has reviewed the treatment of extrinsic act evidence in reported health care fraud prosecutions, finding that such evidence is admitted most often as relevant to intent; admission of such evidence results in more reversals than any other evidentiary ruling; courts do not require close similarity between extrinsic act evidence and charged conduct; courts permit a fair amount of diversion from charged conduct to present the extrinsic act evidence; and the few courts addressing the Rule 403 burden impose it on the proponent of the extrinsic act evidence. Given the nature of health care fraud and in light of other evidentiary issues examined herein, this Article also suggests that extrinsic act evidence is readily available in white collar criminal cases because of the myriad of regulatory agencies that monitor health care providers and collect such evidence in the course of their routine supervision of these providers. Also, the extensive use of summary witnesses in health care fraud prosecutions and white collar criminal cases in general increase the significance of extrinsic act evidence as it is repeated and integrated by the summary witness.

Despite the dangers posed by extrinsic act evidence, such evidence is especially needed in white collar criminal cases where intent is often the only issue in dispute. Extrinsic act evidence is uniquely capable of

273. 406 S.E.2d 758 (W. Va. 1991).

274. *Id.* at 762-63.

275. *Id.* at 776-77.

276. *Id.* at 777.

277. See appendix IV for a listing of reported health care prosecutions where the court's opinion reveals that extrinsic act evidence was introduced. The government was the proponent of this evidence in all but one of these cases. See *United States v. Neely*, 980 F.2d 1074, 1074 (7th Cir. 1992) (finding no abuse of discretion for allowing evidence of an insurance fraud scheme in which defendants participated). In *Neely*, the court restricted defense efforts to use extrinsic act evidence. *Id.* at 1080.

shedding legitimate insight on the intent issue. Steps should be taken, however, to neutralize the dangers posed by extrinsic act evidence while preserving its availability. These steps include: placing the burden on the proponent of such evidence to demonstrate that the prejudicial impact of such evidence does not "substantially outweigh" its probative impact;²⁷⁸ offering proof of extrinsic evidence *in camera*;²⁷⁹ limiting the details of extrinsic act evidence;²⁸⁰ and using limiting instructions.²⁸¹ In assessing which of these options, alone or together, will overcome the special problems posed by extrinsic act evidence in health care fraud or other white collar crime cases, courts should consider recent empirical data indicating that prior bad act evidence is highly influential to jurors,²⁸² while limiting instructions are not.²⁸³

V. DOCUMENTS

Three types of documents form part of the evidence in almost every health care fraud prosecution: patient medical charts, manuals issued by insurers explaining what services are reimbursable, and claim and billing data which may be computer-generated. The reported cases reflect that patient medical charts usually are obtained from defend-

278. See *supra* text accompanying notes 260-77.

279. See, e.g., *United States v. Jackson*, 761 F.2d 1541, 1543 (11th Cir. 1985) (commenting that the trial court took a "thorough proffer" of the extrinsic act evidence outside the presence of the jury prior to permitting its admission).

280. See, e.g., *Neely*, 980 F.2d at 1081 (noting that the trial court limited admission of extrinsic act evidence to general facts about the prior acts).

281. See, e.g., *United States v. Lennartz*, 948 F.2d 363, 367 (7th Cir. 1991) (allowing evidence concerning prior uncharged illegal conduct similar to that for which the defendant was being tried); *Jackson*, 761 F.2d at 1544 (noting that trial judge gave cautionary instruction before admitting extrinsic act evidence).

282. See Fed. R. Evid. 404(b) (generally excluding use of evidence of other crimes, wrongs, or acts to prove character of a person in order to show conformity); Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135, 139-40 (1989); Patricia M. Wald, *Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 U. Chi. Legal F. 101, 115. Cf. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum. Behav. 37, 43 (1985) (discussing the results of empirical studies they conducted to measure the effect of a defendant's prior record on mock jurors' assessments of credibility and guilt, finding that although "[r]atings of the defendant's credibility did not vary as a function of prior record," conviction rates did vary "with the highest conviction rate occurring when the prior conviction was the same as the present charge and the lowest conviction rate occurring in the no-prior-conviction condition").

283. See Sarah Tanford & Michele Cox, *Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgements*, 2 Soc. Behav. 165, 180 (1987) (commenting that limiting instructions may increase prejudicial nature of evidence); Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. Applied Soc. Psych. 205, 216-18 (1977) (finding that limiting instructions actually increase biasing effect of evidence).

ants by searches²⁸⁴ or by grand jury subpoena,²⁸⁵ while claim forms,²⁸⁶ manuals, and other billing instructions²⁸⁷ usually are obtained from governmental agencies or insurers. Over nine percent (thirty-six) of the reported health care fraud prosecutions refer to the documents admitted at trial.²⁸⁸ Of these about one-third (fourteen) include some discussion about the documents admitted.²⁸⁹ This section examines these cases and addresses the following issues: (1) the hearsay within hearsay contained in patient medical files and the right of confrontation and reliability problems this hearsay poses; (2) authentication difficulties, primarily in attempted use of insurers' manuals; and (3) nuances presented by computer-generated evidence.

Several observations can be made about the use of documents in the health care prosecutions. First, the prosecution, as proponent of the documents in all of the reported cases studied herein, experienced a high rate of success on appeal regarding the admission of its documents. The appellate courts affirmed the prosecution's use of docu-

284. See, e.g., *United States v. Abrams*, 615 F.2d 541, 542 (1st Cir. 1980) (patients' medical records seized from physician's office with search warrant); *People v. Blasquez*, 211 Cal. Rptr. 335, 336-37 (Ct. App. 1985) (patients' records seized from psychotherapists' office with search warrant); *State v. DeSmidt*, 454 N.W.2d 780, 783 (Wis. 1990) (patients' dental records seized with search warrant), *cert. dismissed*, 498 U.S. 1043 (1991).

285. See, e.g., *In re Grand Jury Subpoena*, 710 F. Supp. 999, 1001 (D.N.J.) (involving grand jury subpoena issued to psychologist for billing and treatment records of one patient), *aff'd*, 879 F.2d 861 (3d Cir.1989); *In re Grand Jury Investigation*, 441 A.2d 525, 527 (R.I. 1982) (involving grand jury subpoena issued to physician for patient medical records).

286. See, e.g., *United States v. Sanders*, 749 F.2d 195, 196-98 (5th Cir. 1984) (allowing claims submitted by the defendant presented into evidence by employees at the Texas Department of Human Resources); *United States v. Alexander*, 748 F.2d 185, 188 (4th Cir. 1984) (claims submitted by the defendant and analysis of the claims were supplied by Blue Cross/Blue Shield), *cert. denied*, 472 U.S. 1027 (1985).

287. *United States v. Mekjian*, 505 F.2d 1320, 1323 (5th Cir. 1975) (discussing portions of Medicare manual introduced by employee of the Social Security Administration which maintained copies of Medicare manuals and all revisions to it); *State v. Romero*, 574 So. 2d 330, 340-41 (La. 1990) (Watson, J., dissenting) (involving carrier manual and supplementing reimbursement guidelines obtained from the defendants pursuant to a search warrant).

288. See *supra* chart 4 & *infra* appendix IV.

289. See *United States v. Hooshmand*, 931 F.2d 725, 736 (11th Cir. 1991); *United States v. Duncan*, 919 F.2d 981, 985-86 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991); *Alexander*, 748 F.2d at 191; *United States v. Hershenow*, 680 F.2d 847, 850-53 (1st Cir. 1982); *United States v. Vecchiarello*, 536 F.2d 420, 423-24 (D.C. Cir. 1976); *United States v. Radetsky*, 535 F.2d 556, 568 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 994 (10th Cir. 1990); *United States v. Rosenberg*, 515 F.2d 190, 199-200 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975); *United States v. Mekjian*, 505 F.2d 1320, 1326 (5th Cir. 1975); *Heller v. United States*, 104 F.2d 446, 448 (4th Cir. 1939); *In re Grand Jury Subpoena*, 710 F. Supp. 999, 1001-02 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989); *People v. Slocum*, 125 Cal. Rptr. 442, 448 (Ct. App. 1975), *cert. denied*, 426 U.S. 924 (1976); *State v. Romero*, 574 So. 2d 330, 334 (La. 1990); *State v. Hermsdorf*, 605 A.2d 1045, 1047-48 (N.H. 1992); *People v. Alizadeh*, 452 N.Y.S.2d 425, 427 (App. Div. 1982). Note that *In re Grand Jury Subpoena* is not included in the statistics. See *supra* note 6.

ments in 100% of the cases where the admission of documents was challenged on appeal.²⁹⁰ Second, fruitful but little-used avenues exist to challenge the admission of some types of documents typically used by the prosecution in health care fraud prosecutions. Third, the problems both prosecution and defense encounter with documents reveal, once again, that white collar criminal cases pose unique evidentiary problems.

A. *Patient Medical Files: Hearsay Within Hearsay*

Patient medical charts contain entries recorded by many people, including memorialization of oral statements by the patient, the patient's relatives, or others. Most patient medical charts are admitted as records of a regularly conducted business. In fact, the advisory notes to FRE 803(6) identify patient medical records as a prime example of appropriate use of this hearsay exception.²⁹¹ For two reasons, however, patient medical files offered into evidence in prosecutions of health care providers as records of regularly conducted activity, and thus as an exception to the hearsay rule, should be scrutinized carefully. When admitted in such cases, these files may not bear the same indicia of reliability as when offered in cases concerning the medical diagnosis or treatment of a patient. In addition, in some health care fraud prosecutions, the nature of the fraud should render suspect many of the entries deemed reliable in other contexts.

The standard rationale for admitting patient medical records despite the hearsay they contain is that such records are presumptively reliable because it is in the interest of everyone who contributes to them that they be accurate; otherwise, a correct diagnosis or appropriate treatment may not be possible.²⁹² Yet, in most health care fraud prosecutions, the diagnosis of the patient and many of the specifics of the patient's treatment are not an issue. Rather, in the health care fraud prosecutions, patient medical charts typically are admitted to show billing irregularities, such as when the defendant billed for services never performed or billed for a more expensive service than was

290. See *supra* chart 6 & *infra* appendix VI. Undoubtedly, some of this success is due more to the standard of review on appeal for evidentiary decisions of the trial court than the actual merits of the proponent's position. As the United States Court of Appeals for the Seventh Circuit noted: "Appellants who challenged evidentiary rulings of the district court are like rich men who wish to enter the kingdom; their prospects compare with those of camels who wish to pass through the eye of the needle." *United States v. Whalen*, 940 F.2d 1027, 1032 (7th Cir. 1991) (quoting *United States v. Gleicier*, 923 F.2d 496, 503 (7th Cir. 1991), *cert. denied* 112 S. Ct. 54 (1991)), *cert. denied*, 112 S. Ct. 403 (1991).

291. The medical report will be admitted unless it was not prepared in the regular course of business, or if there are reasons to suspect its accuracy. Fed. R. Evid. 803(6) advisory committee's note, *reprinted in* 4 Weinstein's Evidence, *supra* note 159, at 803-49.

292. 4 Weinstein's Evidence, *supra* note 159, ¶ 803(6)[06].

actually performed.²⁹³ In the first instance, the relevant evidence from the patient medical files is an omission: the failure of the file to reflect a service. In the second situation, the relevant evidence consists of descriptions of the services or procedures allegedly performed. While obviously preferable, accurate recording of every service or procedure performed on a patient may not be crucial to proper diagnosis and treatment.

Two of the reported health care fraud prosecutions, *State v. Romero*²⁹⁴ and *People v. Alizadeh*,²⁹⁵ demonstrate the reliability problems associated with patient files in fraud prosecutions of health care providers. The Romeros were physicians convicted on various fraud charges resulting from their Medicaid billings.²⁹⁶ Their convictions were dismissed in part because of the inaccuracy of patient medical files admitted into evidence.²⁹⁷ Records from a nursing home were admitted to support the prosecution's argument that not all of the Medicaid patient visits billed by the defendants were performed.²⁹⁸ The government argued that absence of entries of specific visits established that the defendants did not make these visits.²⁹⁹ The appellate court found that the patient charts contained "glaring deficiencies" and "striking shortcomings."³⁰⁰ It found influential testimony by the nurses who were to record information in patients' files that the files were incomplete records of all services performed on patients.³⁰¹ Because of these deficiencies in the patient files, the court found the evidence insufficient on some counts and ordered them dismissed.

293. In every health care prosecution in which the reported court opinion discussed the use of patient charts as evidence, the charts were introduced by the government to help prove the billing irregularities charged.

294. 574 So. 2d 330 (La. 1990).

295. 452 N.Y.S.2d 425 (App. Div. 1982).

296. *Romero*, 574 So. 2d at 332.

297. *Id.* at 334-36.

298. *Id.* at 334.

299. *Id.* at 333.

300. *Id.* at 334.

301. *Id.* The court explained that:

The most critical deficiency in this documentation is evident in the manner by which the patient files were compiled. Under cross-examination, [the custodian of these documents] acknowledged that she routinely removed patient charts to her office and occasionally took them home overnight so that they might be "thinned." By this she meant that pages of nurses notes, progress notes, physician order sheets, and doctors' orders sheets were regularly culled from patient charts when those charts became too thick. The documents were removed and placed in separate files which the state failed to present at trial.

Id.

In *People v. Alizadeh*,³⁰² a physician specializing in obstetrics was convicted for defrauding the Medicaid program.³⁰³ The government introduced patient medical files to show that the defendant billed Medicaid for services not performed.³⁰⁴ The appellate court found that because of the volume of patients handled at the defendant's clinic and the number of people who recorded information in patient files, "the substantial possibility is presented that there was a mix-up in the handling of the files" and that "erroneous" information was recorded in the patient's file regarding the procedures at issue.³⁰⁵ The court set aside the defendant's conviction.

The type of fraud perpetrated also may result in inaccurate patient medical files. For example, in the "Rx by Fraud" prosecutions where providers "sell" prescriptions for controlled substances,³⁰⁶ the medical files of these "patients" may well reflect false symptoms and medical histories so as to justify the prescriptions.³⁰⁷ In the prosecutions for "Automobile Accident Scams" where the accident victims are co-conspirators in the fraud,³⁰⁸ patient medical files may well reflect false symptoms, false test results and false diagnoses all in an effort to justify the billings to insurers.³⁰⁹ In the "Billing for Unnecessary Services" frauds where providers perform unnecessary medical services but falsely bill insurers for the services as necessary,³¹⁰ medical files may contain false information. In patient dumping cases,³¹¹ where hospitals seek to minimize physical conditions so as to discharge an uninsured or Medicaid patient, the patient's medical files may reflect inaccurate information to justify the discharge. Even the new types of

302. 452 N.Y.S.2d 425 (App. Div. 1982).

303. *Id.* at 426-27, 431 (convicting defendant on one count of grand larceny in the third degree, and 163 counts of offering a false instrument for filing in the first degree, all arising from his billings to Medicaid for services never performed).

304. *Id.* at 427, 432.

305. *Id.* at 429.

306. Bucy, *Fraud By Fright*, *supra* note 5, at 889-93.

307. For example, in *United States v. Mahar*, 801 F.2d 1477 (6th Cir. 1986), "patients" at the defendant's medical clinic who were seeking prescriptions for controlled substances described symptoms as "pain and nerves," "diet," "weight loss and pain," "a back problem," "cold problem," and "pain." *Id.* at 1482-83. One undercover officer visiting the defendant's clinic as a "patient" told the medical assistant he had a "back problem." The officer was told "the doctor would not buy a back problem." *Id.* The officer then said he was having a "pain in the heel of his foot and that his neck hurt." *Id.* This complaint was deemed sufficient. *Id.* at 1483.

308. Bucy, *Fraud By Fright*, *supra* note 5, at 899-905.

309. See *United States v. Duncan*, 919 F.2d 981, 984-85 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991).

310. Bucy, *Fraud By Fright*, *supra* note 5, at 920-32.

311. See Karen I. Treiger, Note, *Preventing Patient Dumping: Sharpening the COBRA's Fangs*, 61 N.Y.U. L. Rev. 1186, 1186-87 (1986) (explaining that patient dumping is a phenomenon which occurs when a hospital sends a patient away because the patient is unable to pay); see also The Consolidated Omnibus Reconciliation Act of 1986 (COBRA) § 9121, 42 U.S.C.A. § 1395dd (West Supp. 1992) (requiring hospitals to provide emergency medical treatment to individuals).

fraud likely to develop with health care reform, such as the failure to provide necessary services while seeking reimbursement by falsely representing that all necessary services were provided,³¹² will be easier to commit and conceal with false entries in patient medical files.

For these reasons, although patient medical files generally qualify as records of a regularly conducted activity and thereby overcome a hearsay objection, patient files should be considered on a case-by-case basis when offered in health care fraud prosecutions.

B. *Provider Manuals: Authentication*

One of the more important types of documents used in health care fraud prosecutions is the "Provider Manual." Both the Medicare and Medicaid programs contract with private insurance companies to service providers and patients participating in these programs.³¹³ "Provider Manuals" are prepared by these selected organizations in conjunction with health care financing agencies or state governments,³¹⁴ and detail the procedures for providers to obtain reimbursement for services rendered to qualifying patients.³¹⁵ They are voluminous, amended often and supplemented by correspondence from insurers and state and federal agencies.³¹⁶ Provider manuals may also incorporate billing codes from other sources that may conflict with the manual.³¹⁷ Supposedly, all of these sources of reimbursement data are supplied to participating providers.³¹⁸

312. Bucy, *Health Care Reform and Fraud*, *supra* note 147, at 1005.

313. Paul Starr, *The Social Transformation of American Medicine* 375 (1982).

314. See 5 Medicare & Medicaid Guide (CCH), at 30,201 (1993) (listing latest revisions to Medicare provider manuals). As one court explained, "Although written by the Department of Health and Human Resources, the fiscal intermediary has the responsibility to print and distribute provider manuals, as well as updates and revisions." *State v. Romero*, 574 So. 2d 330, 332 n.5 (La. 1990).

315. 2 Medicare & Medicaid Guide (CCH) ¶¶ 5841-8113 (1990).

316. See, e.g., *United States v. Mekjian*, 505 F.2d 1320, 1323 (5th Cir. 1975) (ruling that a provider manual was inadmissible because there was no testimony as to its currency); *Romero*, 574 So. 2d at 341 n.9 (Watson, J., dissenting) (admitting the provider manual that had been revised at least 13 times: seven times in 1984, four times in 1986, and two times in 1987 (the years at issue)).

317. *Romero*, 574 So. 2d at 332, 338. The provider manual for the Louisiana Medicaid program directed physicians to use certain codes found in the Current Procedural Terminology (CPT) books printed by the American Medical Association. "Not all of the codes listed in the CPT books have been adopted by the Medicaid system and the provider manuals do not indicate which CPT codes are used in Medicaid, but provide only a broad description of what is covered." *Id.* at 332. Sometimes there are conflicts in the billing codes in the provider manual and the CPT. *Id.* at 341 (Watson, J., dissenting).

318. See, e.g., *United States v. Mekjian*, 505 F.2d 1320, 1323 (5th Cir. 1975) (government introduced evidence of a Medicare manual on coverage issued to carriers in order to show that appellant was aware of changes in coverage and billing procedures); *Romero*, 574 So. 2d at 341 (provider manual was frequently updated or changed creating distribution problems).

The volume, complexity and ever-changing nature of these manuals and their supplementing correspondence present at least two hurdles for prosecutors—and two potential boons for defendants. The first is authenticating the manual, such as proving which reimbursement guidelines are applicable to the issues in the case at bar. In *United States v. Mekjian*,³¹⁹ for example, the Medicare Manual was ruled inadmissible by the trial court because “there was no testimony as to the currency of the manual at the time in issue.”³²⁰

The second hurdle presented for the government by provider manuals does not involve authentication, but proof of intent. Highlighting the ambiguity, complexity and inconsistency in carrier manuals, defendants may persuade fact finders that if they billed incorrectly, they did so unintentionally because they were confused by confusing billing requirements.³²¹

C. Computer-Generated Evidence

Computer-generated evidence is becoming more common in health care fraud criminal prosecutions. Since 1972, over five percent of the reported decisions reflect that such evidence has been admitted.³²² Before 1972, there were no reported uses of computer-generated evidence.³²³ This trend toward greater use of computer-generated evidence in health care fraud prosecutions is consistent with the trend in complex civil trials.³²⁴ Courts have struggled with computer-generated evidence and many experts have questioned whether rules of evidence developed prior to the explosion of computer technology are adequate for computer evidence.³²⁵ As the reported health care fraud prosecutions demonstrate, this concern should be even greater when the computer-generated evidence is used in a criminal case.

319. 505 F.2d 1320.

320. *Id.* at 1323.

321. This defense was attempted unsuccessfully in *Romero*, 574 So. 2d at 338-39, 340-42 (Watson, J., dissenting).

322. See *supra* chart 4 and *infra* appendix IV.

323. *Id.*

324. Mark A. Johnson, Comment, *Computer Printouts as Evidence: Stricter Foundation or Presumption of Reliability*, 75 Marq. L. Rev. 439, 439 n.1 (1992).

325. See, e.g., Rudolph J. Peritz, *Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence*, 80 Nw. U. L. Rev. 956, 959-620 (1986) (arguing in favor of imposing the stricter qualification suggested in the Manual for Complex Litigation for qualifying computer-generated evidence); James A. Sprowl, *Evaluating the Credibility of Computer-Generated Evidence*, 52 Chi.-Kent L. Rev. 547, 566 (1976) (outlining the steps litigants and courts should employ prior to the introduction and computer-generated evidence).

1. Authentication of Computer-Generated Evidence

The proponent of any evidence must demonstrate that it is what it purports to be.³²⁶ Federal Rule of Evidence 901(b)(9) specifies that the proponent of computer-generated evidence should produce evidence "describing the process or system used to produce the evidence" and "showing that the process produces an accurate result."³²⁷

There are three major stages at which error can be introduced into computer-generated evidence: inputting the data in the computer, processing the data by the computer, and evaluating the data generated by the computer.³²⁸ The proponent of computer-generated evidence should demonstrate the accuracy of such evidence at all stages.³²⁹

Commentators and courts disagree about the level of proof needed to authenticate computer-generated data. Many of the older cases required rigorous proof of accuracy.³³⁰ Although criticized,³³¹ many modern courts have relaxed authenticating standards for computer-generated evidence.³³² According to one commentator, "Courts seem to treat computerized records as if they were self-authenticating."³³³ The health care fraud cases reflect this relaxed approach toward authentication requirements for computer-generated evidence. In only two of the thirteen reported health care fraud prosecutions discussing computer-generated evidence did the issue of authentication arise at all.³³⁴ Both of the courts bucked the trend toward relaxing authentication standards and required rigorous compliance with authentication requirements. In *United States v. Russo*,³³⁵ the government, as proponent of the evidence, introduced detailed testimony by individu-

326. Fed. R. Evid. 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

327. Fed. R. Evid. 901(b)(9).

328. Colin Tapper, *Evidence From Computers*, 8 Ga. L. Rev. 562, 566-67 (1974).

329. *Id.*

330. See, e.g., *United States v. Scholle*, 553 F.2d 1109, 1125 (8th Cir.) (discussing protracted dialogue concerning the foundation for reception of computer evidence), *cert. denied*, 434 U.S. 940 (1977); *Transport Indemnity Co. v. Seib*, 132 N.W.2d 871, 873-76 (Neb. 1965) (authentication testimony stretched across 141 pages of the trial record); see also *Johnson*, *supra* note 324, at 448 (describing accuracy problems with computer printouts).

331. Peritz, *supra* note 325, at 978-84.

332. See, e.g., *United States v. Vela*, 673 F.2d 86, 90 (5th Cir. 1982) (testifying witness only needed to vouch for the general reliability of billing process); *Perma Research & Dev. v. Singer Co.*, 542 F.2d 111, 125 (2d Cir.) (noting that routinely prepared records are often admitted as evidence because their regular use in the business of a company ensures a high degree of accuracy), *cert. denied*, 429 U.S. 987 (1976); see also *Johnson*, *supra* note 324, at 450 ("Modern courts generally employ liberal standards when assessing the admissibility of computer-generated evidence.").

333. Peritz, *supra* note 325, at 981-82.

334. *United States v. Russo*, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *State v. Vogelsong*, 612 N.E.2d 462 (Ohio Ct. App. 1992).

335. 480 F.2d 1228.

als familiar with all stages of the data generated by the computer. The testimony of these witnesses detailed the procedures for checking claims data before it was put into the computer, the calculations performed on the data by the computer, the subsequent uses made of these calculations, and the steps throughout all stages to verify accuracy.³³⁶ The *Russo* court found sufficient indicia of accuracy and held that the computer-generated evidence was properly admitted.³³⁷ Adhering to the same requirements, the court in *State v. Vogel song*³³⁸ found inadequate indicia of reliability when data initially was put into the computer and ruled that the computer-generated evidence was erroneously admitted by the trial court.³³⁹

Despite the general trend toward relaxing authentication requirements for computer-generated evidence, the better approach is to require the more rigorous analysis shown in *Russo*³⁴⁰ and *Vogel song*.³⁴¹ Errors can easily occur at all three stages of creating computer evidence.³⁴² Data is coded into the computer by hand. Inattention or even one slip of a finger when typing can introduce mistakes in the initial inputting stage. Especially when the data consists of numbers, the usual methods for checking accuracy of material typed into a computer will not work.³⁴³ Mistakes can also occur at the second stage, when the inputted data is calculated, re-ordered or reorganized by the computer. Errors at this stage could arise from "viruses" which infect even the most reliable software, or "hackers" who circumvent a computer's security system and create inaccuracies in data.³⁴⁴ Finally,

336. *Id.* at 1233-36.

337. *Id.* at 1239-41. James Sprowl criticizes Russo's holding that the peer group comparison was properly admitted. Sprowl's analysis is excellent guidance for counsel seeking to exclude computer-generated peer group comparisons. Sprowl, *supra* note 325, at 563-65.

338. 612 N.E.2d 462, 464-66 (Ohio Ct. App. 1992) (requiring the government, as proponent of the evidence, to authenticate the computer records and demonstrate that they were not hearsay).

339. *Id.* The court found that the testimony by the authenticating witness was not specific enough to verify the accuracy of the data or the method of input, and that the government failed in its attempt to qualify the computer records as a "public record" exception to the hearsay rule. *Id.*

340. 480 F.2d 1228.

341. 612 N.E.2d 462.

342. See generally Sprowl, *supra* note 325, at 562-66 (providing an excellent discussion of errors that may occur in computer-generated evidence, especially when used to create summaries).

343. For example, the "spell check" function in word processing programs will not detect arithmetic or numerical inputting errors.

344. Martha Stansell-Gamm & Scott Chamey, *Introducing Electronic Evidence*, in A.B.A. Nat'l Inst., Health Care Fraud, at 6-7 (1994). Stansell-Gamm and Chamey noted that:

Computers process data in many different ways by running programs, which can be commercially or privately written. Any of these programs can contain logical errors, called "bugs," which could significantly affect the accuracy of the computer process. And even if there is no error in the code, a technician may run the program in a way that creates a false result. For

errors can occur in the final stage when the computer-generated data is interpreted. Proponents of computer-generated evidence should be required to show that adequate steps were taken to prevent and detect errors at all three stages. A full presentation of such evidence or a stipulation to it by the parties will ensure that the opponent of the evidence, the jury and the court are aware of the strength or weakness of such evidence.³⁴⁵

Some commentators oppose requiring "extensive" foundation prior to admission of computer-generated evidence.³⁴⁶ To the extent these commentators underestimate the potential for errors in computer-generated evidence, they are wrong. To the extent they disapprove of requiring more than is already required in current authentication evidentiary requirements, they are correct. Authentication evidence in addition to the requirements in FRE 902 is not necessary to ensure reliability of computer-generated evidence. Enforcement of the mandate of FRE 901 and 902 that the proponent of computer-generated evidence, like the proponent of any evidence, show that the evidence is what it purports to be, is sufficient to guard against inaccuracy of computer-generated evidence.

More than cross examination at trial of an authenticating witness may be necessary, however, to fully explore potential inadequacies in computer-generated evidence. The opponent of such evidence, however skilled, may not be able to conduct a thorough cross examination simply from the discovery made available under current criminal procedure rules. Although Federal Rule of Criminal Procedure 16 requires, for example, production and physical examination of the exhibits (perhaps even of the computer),³⁴⁷ this may not be adequate preparation for the opponent of such evidence. The 1993 amendment

example, a particular computer search program may be "case sensitive," which means that the upper—and lower—case versions of any given letter are not interchangeable. If an author working in WordPerfect (a popular word-processing program), searches a document for the word "Evidence," the computer will not find the word "evidence," because the letter "e" was not capitalized.

Id.

345. It appears that courts' failure to require full authentication for computer-generated evidence more likely is due to courts' and litigants' relative inexperience with computer-generated data rather than a well reasoned decision not to require such evidence. As one commentator has noted, the "few reported decisions on computer[-generated evidence] contain superficial and inconsistent analyses." Johnson, *supra* note 324, at 444.

346. See Mark A. Dombroff, *Dombroff on Unfair Tactics*, § 14.37, at 510 (2d ed. 1984); 5 Weinstein's *Evidence*, *supra* note 159, ¶ 1001(4)[07].

347. Fed. R. Crim. P. 16(a)(1)(C) provides that:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for

to Federal Rule of Criminal Procedure 16, requiring a party using expert testimony to disclose "the bases and reasons" of the testimony,³⁴⁸ offers little improvement for two reasons: (1) the custodian may not be an "expert" within this amendment; and (2) a written report is no substitute for oral inquiry of the custodian and physical examination of the computer facilities.

The above steps, singly or together, will be adequate in some cases to give the opponent of computer-generated evidence a true opportunity to inquire into the accuracy of the evidence. In some cases, however, they will be inadequate. Depositions or interrogatories, used widely in civil litigation,³⁴⁹ are almost nonexistent in criminal cases. Interrogatories are never allowed. Depositions are allowed only in "exceptional circumstances."³⁵⁰ These prohibitions make sense given the relatively straightforward nature of most criminal cases, the potential for danger to witnesses or on-going investigations in many criminal cases, and the confrontation requirement of the Sixth Amendment.³⁵¹ As the reported health care fraud prosecutions suggest, however, white collar criminal cases break the mold. Use of computer-generated evidence is a prime example of this. In a criminal case where computer-generated evidence raises substantial questions of authentication, the court should consider allowing the opponent of such evidence to depose the witness who will be serving as the authenticating witness of the computer evidence. In addition to fully equipping the opponent of such evidence to conduct a full examination, such a step should streamline in-court presentation of such evidence and increase the likelihood of time-saving stipulations by all parties as to some or all of the authentication issues. Moreover, a case-by-case

use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id.

348. Fed. R. Crim. P. 16(a)(1)(E).

349. Depositions may be taken as a matter of right by notice and without permission of the court in civil cases. See Fed. R. Civ. P. 30(a).

350. Fed. R. Crim. P. 15(a) provides that:

Whenever due to exceptional circumstances of the case it is the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition

Id.

The district court has wide discretion to determine when "exceptional circumstances" exist, subject to abuse of discretion review by appellate courts. *United States v. Allie*, 978 F.2d 1401, 1405 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1662 (1993); *see, e.g., United States v. Campbell*, 845 F.2d 1374 (6th Cir.) (stating that it is well established that "the infirmity of an elderly witness which prevents him or her from traveling is an 'exceptional circumstance' which justifies the use of deposition at trial") (citation omitted), *cert. denied*, 488 U.S. 908 (1988).

351. The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him" U.S. Const. amend. VI.

granting of defendants' right to depositions or interrogatories will allow courts to monitor the danger such disclosure presents to witnesses or investigations.

2. Computer-Generated Evidence as Hearsay?

The reported health care fraud prosecutions reveal three ways proponents of computer-generated evidence have overcome or attempted to overcome a hearsay objection: (1) introducing such evidence as a statement of the defendant and thus not as hearsay pursuant to FRE 801 (2)(A),³⁵² (2) introducing such evidence as records of a regularly conducted activity pursuant to FRE 803(6);³⁵³ and (3) introducing such evidence as a public record exception pursuant to FRE 803(8).³⁵⁴

a. *Statement of a Defendant*

The courts treated the computer-generated evidence as a statement of the defendant in only two of the reported health care fraud prose-

352. Fed. R. Evid. 801(d)(2) provides that:

A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Id.

353. Fed. R. Evid. 803(6) provides that:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Id.

354. Fed. R. Evid. 803(8) provides:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id.

cutions. *People v. Perry*³⁵⁵ is especially exemplary of this approach. Perry and other podiatrists were indicted for billing Medicaid for orthotic custom-made appliances when they were actually supplying cheaper, non-custom-made appliances.³⁵⁶ The trial court dismissed the indictment upon defendants' pretrial motion, finding that "there was insufficient competent evidence" before the grand jury to establish a *prima facie* case.³⁵⁷ Specifically, the trial court found that the government failed to establish an adequate foundation for admission of computer printouts of defendants' Medicaid claims.³⁵⁸ The appellate court reversed, finding that the government adequately overcame the hearsay objection by qualifying the computer printouts as business records under New York's evidence rules³⁵⁹ and as admissions of the defendant. According to the court, "[T]he claims submitted by defendants constituted admissions when submitted to the billing service"³⁶⁰

Similarly, in *United States v. Sanders*,³⁶¹ the court summarily dismissed the defendant's argument that billing information generated by computer on behalf of Sanders' pharmacy was hearsay. The court noted that: "The records at issue here were based on claims forms submitted by Sanders or his agents, and were not hearsay because the claims qualify as admissions under FRE 801(d)(2)(C)."³⁶²

b. *Records of a Regularly Conducted Activity*

In almost half of the reported health care fraud prosecutions wherein computer-generated evidence was offered, the court admitted such evidence as records of a regularly conducted activity.³⁶³ Records may be admitted as a hearsay exception under FRE 803(6) if the following is shown:

- the data compilation was made at or near the time by, or from information transmitted by, a person with knowledge;
- the data compilation is kept in the course of a regularly conducted business activity;
- it must be the regular practice of that business activity to make the data compilation;

355. 605 N.Y.S.2d 790 (App. Div. 1993).

356. *Id.* at 792.

357. *Id.*

358. *Id.* at 793.

359. *Id.* at 794.

360. *Id.*

361. 749 F.2d 195 (5th Cir. 1984).

362. *Id.* at 198.

363. Although 9 of the 14 reported health care fraud prosecutions where computer-generated evidence was introduced analyzed the evidentiary issues, only four of these cases analyzed and admitted such evidence as records of a regularly conducted activity. See *Sanders*, 749 F.2d at 198; *United States v. Russo*, 480 F.2d 1228, 1239 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *People v. Weinberg*, 586 N.Y.S.2d 132, 134 (App. Div. 1992); *State v. Chenette*, 560 A.2d 365, 371 (Vt. 1989).

- all of the above is shown by the testimony of the custodian or other qualified witness; provided
- both the source of the information and the method and circumstances of its preparation indicate trustworthiness.³⁶⁴

FRE 803(7) further provides that if the source of information appears to be trustworthy, the absence of a matter in a data compilation qualifying under 803(6) may be used "to prove the nonoccurrence or non-existence of the matter."³⁶⁵

Although not all computer-generated evidence will qualify as business records because it may not be produced by a "regularly conducted activity," the type of computer evidence introduced in reported health care fraud prosecutions and likely to be used in future prosecutions should qualify. In the reported prosecutions, the computer evidence introduced consisted of data obtained or generated by insurers or their designees and concerned claims for health care services.³⁶⁶ These insurers created and maintained this data so as to conduct their daily duties of paying claims to providers.

*United States v. Sanders*³⁶⁷ typifies the analysis of computer-generated evidence as a record of a regularly conducted activity. Sanders, a pharmacist, was convicted of Medicaid fraud and drug and tax offenses.³⁶⁸ His sole challenge on appeal was that computer printouts were improperly admitted as business records. These printouts showed medical claims that had been received from Sanders, and processed and paid by the Texas Department of Human Resources (TDHR).³⁶⁹ Two witnesses testified about these records. The first witness reviewed the procedures for transferring to magnetic tape information about Medicaid claims supplied by the defendant. His testimony detailed the methods used to ensure that the information was transposed accurately. The second witness reviewed the procedures for entering the data from the magnetic tape into the computers at the TDHR, the computations performed on this data, and the uses made of it by the TDHR.³⁷⁰ The defendant argued that the computer printouts were improperly admitted as business records because they were prepared for litigation instead of "at or near the time" of the

364. Fed. R. Evid. 803(6).

365. Fed. R. Evid. 803(7).

366. For example, in *Russo*, computer evidence was generated from claim forms ("Doctor Service Reports"), each of which contained the following information: (1) the provider's code number and name, (2) the name, address, identification number, and other statistical data of the subscriber (who may be different from that of the patient, i.e., the subscriber may be the patient's employer), and (3) diagnosis of the patient, date of service, and description of the service rendered to patient. The provider completes the third category of information using the billing codes provided by the insurers to describe the service rendered. 480 F.2d at 1232.

367. 749 F.2d 195 (5th Cir. 1984).

368. *Id.* at 196.

369. *Id.*

370. *Id.* at 198.

events recorded.³⁷¹ The *Sanders* court rejected this argument, reasoning that "[t]he printouts themselves may have been made in preparation for litigation, but the data contained in the printouts was not so prepared."³⁷²

This view regarding the contemporaneity of computer printouts is the only realistic position. As the United States Court of Appeals for the Sixth Circuit has noted: "It would restrict the admissibility of computerized records too severely to hold that the computer product, as well as the input upon which it is based, must be produced at or within a reasonable time after each act or transaction to which it relates."³⁷³

In one respect, however, it appears that the *Sanders* court would unduly restrict the qualification of computer printouts as business records. In dicta, this court stated that it would not allow printouts to qualify as business records if the computer selectively compiled only some of the relevant information stored.³⁷⁴ In such an instance, according to the *Sanders* court, the printouts would become summaries and ineligible to qualify as records of regularly conducted activity.³⁷⁵

The extent to which selective retrieval of data stored in a computer affects admissibility of computer-generated data is an issue likely to arise in more health care fraud prosecutions because it is one of the major ways computer-generated evidence is employed in these prosecutions. These prosecutions indicate that computer-generated evidence is used in two ways: to calculate the amount of monetary loss attributable to the defendant³⁷⁶ and to compare billing practices of the defendant to peer providers.³⁷⁷ Peer group comparisons are created

371. *Id.* Defendants in other reported health care fraud prosecutions raised this same argument. See *United States v. Russo*, 480 F.2d 1228, 1240 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *People v. Weinberg*, 586 N.Y.S.2d 132, 134 (App. Div. 1992).

372. *Sanders*, 749 F.2d at 198.

373. *Russo*, 480 F.2d at 1240.

374. *Sanders*, 749 F.2d at 199.

375. *Id.* The court rejected the defendant's argument that the computer-generated evidence became summaries, disagreeing with the defendant's view of the facts. The court found that the computer printout was not a "selective compilation of random pieces of data stored in [the computers] but was instead a complete list of all information . . . relating to [the defendant's] claims." *Id.* Because the printout included all such information, the court found that the printout did not transform from "business records into summary evidence." *Id.* at 199. This brief deference seems to imply that computer prints are either seen as business records or summary evidence.

376. Cases where computer-generated evidence was introduced as the calculation of monetary loss attributable to the defendant include: *People v. Weinberg*, 586 N.Y.S.2d 132, 134 (App. Div. 1992); *State v. Vogelsong*, 612 N.E.2d 462, 464 (Ohio Ct. App. 1992).

377. Cases where computer-generated evidence was introduced to compare the defendant to peer providers and to permit inferences regarding guilt or knowledge include: *United States v. Johnson*, 634 F.2d 735, 736 (4th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *United States v. Seelig*, 622 F.2d 207, 214-15 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980); *United States v. Halper*, 590 F.2d 422, 426 (2d Cir. 1978); *United*

by selectively retrieving some of the data stored in a computer. Only providers similar to the defendant-provider should be included in a peer group comparison,³⁷⁸ and typically, only data regarding a few procedures performed by the providers is included.³⁷⁹ A peer group comparison selects some of the data among all available and reorganizes it, thus constituting a summary in the eyes of the *Sanders* court, and for that reason, may fail to qualify as a business record under 803(6).³⁸⁰ The *Sanders* court's either/or choice is not necessary. Peer group comparisons are both summaries and business records. As long as the data is put into the computer, the process of inputting and the use made of such data qualifies the data as a business record, and it should not matter whether the computer printout reproduces all data in the computer or selectively reproduces some of it. In either case, the printout is a business record.

c. Public Records and Reports

In only one reported health care fraud prosecution did the proponent of computer-generated evidence attempt to admit such evidence as a public record exception to hearsay.³⁸¹ Such minimal reliance on this hearsay exception is consistent with the overall trend in com-

States v. Russo, 480 F.2d 1228, 1234-37 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *State v. American Medical Ctrs., Ltd.*, 324 N.W.2d 782, 787 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 1009 (1983); *State v. Venman*, 564 A.2d 574, 576 (Vt. 1989). Proponents of computer-generated evidence for use as peer group comparisons were successful in obtaining admission of such evidence in all cases except *Seelig*, 622 F.2d at 214-15.

378. The court in *Seelig* discussed this need for similarity when it reversed the conviction of a pharmacist:

Appellants object to the admission of exhibit 213, which purportedly is a sales comparison chart . . . comparing the sales of [controlled substances] with eight other pharmacies allegedly comparable in size, location, and volume. . . .

The admission of the sales comparison chart was error There was no attempt to compare the stores in terms of total sales [The authenticating witness] did not know if [the] allegedly comparable stores operated the same hours The record does not show these other stores were the same size, covered the same marketing area, were open the same hours, had pharmacist's on duty at all times, had the same access to the public, or, more importantly, charged the same prices—all of which could have significantly affected the volume of sales. Thus, the sales comparison chart is simply irrelevant for failure to establish the comparability of the other stores.

622 F.2d at 214-15.

379. See, e.g., *Russo*, 480 F.2d at 1236 (showing that testimony of witness concerned only five medical procedures out of the total number identified in the prosecution).

380. See *United States v. Sanders*, 749 F.2d 195, 199 (5th Cir. 1984) (implying that if the computer-generated evidence had been a "selective compilation" rather than a "complete listing of all information," it may not have qualified as a summary admissible under FRE 1006).

381. *State v. Vogelsong*, 612 N.E.2d 462 (Ohio Ct. App. 1992).

puter-generated evidence.³⁸² Federal Rule of Evidence 803(8) provides a hearsay exception for data compilations that set forth:

- the activities of the office or agency;
- matters observed pursuant to a duty imposed by law (excluding matters observed by police officers and other law enforcement personnel); or
- factual findings, in civil actions and proceedings and against the Government in criminal cases, resulting from an investigation made pursuant to authority generated by law.³⁸³

Each of the above are admissible “unless the sources of information or other circumstances indicate lack of trustworthiness.”³⁸⁴

In *State v. Vogelsong*,³⁸⁵ where a pharmacy and pharmacist were convicted of Medicaid fraud, computer-generated evidence showing the total monetary loss caused by the defendants’ activity was admitted by the trial court.³⁸⁶ The appellate court reversed the conviction in part, because the government as proponent of this evidence failed to lay sufficient foundation to qualify the computer evidence as public records under 803(8).³⁸⁷ Despite the testimony from the custodian of record that this information was “authorized by law to be recorded or filed” by the Ohio Department of Human Services, the court found that “there is no contention that [this exhibit] is . . . a report . . . required to be made by law.”³⁸⁸ Given such testimony, it would appear that these records were public records and that the court’s ruling is unsubstantiated.

Nevertheless, qualifying computer-generated evidence as a public record in health care fraud prosecutions may be problematic. Although many records regarding Medicare and Medicaid are required to be kept by law, the two types of computer-generated evidence used thus far in health care fraud prosecutions (calculation of monetary loss occasioned by defendant’s conduct and peer group comparisons) may not be specifically required.³⁸⁹ In addition, if the prosecution involves fraud upon private insurers, the Medicare and Medicaid mandates regarding record keeping would not apply. Also, the hybrid nature of white collar crimes in general and health care fraud in particular may render Rule 803(8) difficult to apply. Many, if not most, criminal investigations into health care fraud are initiated or assisted by regulatory agencies. The employees of these agencies are not “law enforcement personnel” yet are engaged in “criminal cases.”

382. Johnson, *supra* note 324, at 462 (“Far fewer published cases discuss computer-generated public records than discuss computer-generated business records.”).

383. Fed. R. Evid. 803(8).

384. See *supra* note 354 for the full text of Fed. R. Evid. 803(8).

385. *Vogelsong*, 612 N.E.2d at 462.

386. *Id.* at 464.

387. *Id.* at 464-65.

388. *Id.* at 465.

389. See *infra* text and accompanying note 513.

The drafters of Rule 803(8) apparently did not anticipate this blending of civil and criminal government resources because Rule 803(8) excludes from records eligible for admission pursuant to its provisions "matters observed by . . . law enforcement personnel . . . in criminal cases."³⁹⁰ Thus, the question arises: Are data compilations designed and prepared by non-law enforcement personnel within this exclusion if generated for a criminal case?

D. Conclusion

Patient medical files, provider manuals, and claim and billing data, often computer-generated, are the three major types of documents used in health care fraud prosecutions. Each presents unique evidentiary problems, in part because each is more commonly used in civil cases than in criminal. Patient medical charts, containing hearsay from numerous sources, routinely overcome a hearsay objection as a non-hearsay statement by the defendant or as records of a regularly conducted activity. In some prosecutions of health care fraud, however, admission of patient charts has been problematic, sometimes even leading to reversals. Patient charts are unreliable for proving health care fraud for two reasons. The relevant information (listing of each service or procedure performed) may not be accurately recorded, even in legitimate clinics, if it is not relevant to diagnosis and treatment. Second, the fraud itself may create the incentive to falsify medical records. Provider manuals also present problems because of the haphazard way these manuals are created, updated and communicated to providers. Claims and billing data, especially when generated by computers, are susceptible to human and mechanical error. Rigorous compliance with authentication rules should be required before such evidence is admitted. Because claims for payment originate with defendants and are processed by insurers in their course of regular business activity, claims data should easily overcome any hearsay objection.

Adjustments in criminal rules of procedure are necessary, however, if health care fraud prosecutions are to be litigated fairly. For example, depositions or interrogatories should be permitted of witnesses who will authenticate computer-generated evidence at trial. Only in this way are opponents of such evidence ensured of their right of confrontation through cross examination. Expanding pretrial discovery in this limited manner may also streamline in-court presentation of evidence and facilitate stipulations by the parties.

VI. SEARCHES

No type of evidence better demonstrates the hybrid criminal/civil nature of white collar crime than evidence obtained by search war-

390. Fed. R. Evid. 803(8).

rants. Issued by a neutral and detached magistrate upon a finding of probable cause,³⁹¹ and executed by law enforcement personnel to search and seize evidence and instruments of a crime, search warrants are a prototypical criminal investigative tool. As the reported health care fraud prosecutions show, however, the courts have struggled with establishing search and seizure doctrines when confronted with search warrants in the nontypical white collar criminal case.

In thirteen percent (forty-eight) of the reported health care fraud prosecutions, evidence was obtained by searches.³⁹² This is a surprisingly high percentage given the fact that evidence can be obtained more easily through grand jury subpoenas³⁹³ or civil investigative demands ("CIDs"),³⁹⁴ both of which may be issued without a showing of probable cause and without prior presentation to a court.³⁹⁵ There

391. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

392. See *supra* chart 4 & *infra* appendix IV.

393. Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* § 6:09 (1986) ("Most evidence that is presented to the grand jury is obtained by use of the subpoena power.").

394. See Anthony J. McFarland, *The Civil Investigative Demand: A Constitutional Analysis and Model Proposal*, 33 Vand. L. Rev. 1451, 1451 (1980) (describing a civil investigative demand as a mandatory process used by both state and federal prosecutors in the precomplaint stage of litigation). McFarland also notes that prosecutors use civil investigative demands (CIDs) to determine if a violation of law has occurred and whether additional investigation is necessary. *Id.* A CID may require either the production of documentary material for inspection, copying, or reproduction; completion of interrogatories; or the giving of oral testimony. *Id.* at 1452.

A CID may be issued only if (1) the CID complies with the requirements of the statute which provides for the CID; (2) the scope of the demand is limited; (3) the demand is for material deemed relevant; (4) the material is adequately described, and (5) there is judicial review of the CID. *Id.* at 1466.

There are a number of federal statutes that provide for civil investigative demands. See, e.g., False Claims Act, 31 U.S.C. § 3733 (1994) (giving the Attorney General the power to make civil investigative demands in investigating false claims); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1968 (1984) (giving the Attorney General the power to make CIDs in investigating RICO offenses); 15 U.S.C. § 1312 (1984) (giving the Attorney General or Assistant Attorney General in charge of the Antitrust Division the power to issue CIDs in Antitrust investigations); see also Richard L. Perry & William Simon, *The Civil Investigative Demand: New Fact-Finding Powers For The Antitrust Division*, 58 Mich. L. Rev. 855, 856-57 (1960) (describing the presentation to Congress of two bills authorizing the Attorney General to obtain documents by means of CIDs and to maintain a permanent library of such documents, administered by a "Documents Custodian").

395. See *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) (describing the broad powers of the grand jury). As the court noted:

[T]he grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not" The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred

may be several reasons for the popularity of search warrants: concern by investigators that records or other evidence will be destroyed or altered if a defendant or target of an investigation is forewarned by a subpoena or CID; the unavailability of a sitting grand jury in some jurisdictions;³⁹⁶ or the desire by investigators to avoid the disclosure prohibitions that attach to grand jury material.³⁹⁷ This latter reason may be of increasing concern as law enforcement agencies work more with civil auditors or other investigators who may not be eligible for grand jury disclosure.³⁹⁸ Case law has also evolved, making search warrants more useful in complex criminal cases. Until the last few decades, search warrants were not available for seizure of "mere evidence;" they could be used only to seize "contraband and instrumentalities of a crime."³⁹⁹ Since the Supreme Court decisions in *Warden v. Hayden*⁴⁰⁰ and *Andresen v. Maryland*,⁴⁰¹ however, search warrants may be employed to seize "mere evidence," such as the documents needed to investigate white collar crimes.⁴⁰²

A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged [T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists.

Id. (citations omitted).

396. See Beale & Bryson, *supra* note 393, §§ 1.05-.06 (discussing availability of grand juries in state and federal systems).

397. Fed. R. Crim. P. 6 (e)(2) provides that: "A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made [in the grand jury proceedings] . . . shall not disclose matters occurring before the grand jury" See *Larouche v. United States Dep't of Justice*, 1993 U.S. Dist. LEXIS 9412, at *9 (D.D.C. June 25, 1993); *In re Grand Jury Matter*, 516 F. Supp. 27, 27-28 (E.D. Pa. 1981).

Although Fed. R. Crim. P. 6(e)(3)(A)(ii) allows disclosure to government attorneys and personnel "as are deemed necessary . . . to assist an attorney for the government," this disclosure may not be broad enough to include all persons the government attorney deems necessary to fully assist the attorney. See *LaRouche*, 1993 U.S. Dist. LEXIS 9412, at *11-12; see also *In re Grand Jury Matter*, 516 F. Supp. at 28 (finding that a county official is not within the disclosure rule because she is not an "attorney for the government").

398. Health care fraud task forces, coordinated through United States Attorneys and comprised of agents from multiple federal and state agencies are being formed throughout the United States to better investigate, deter and prosecute health care fraud. See Rhonda L. Rundle & Amy Stevens, *Investigators Intensify Crackdown on Fraud in the Health Industry*, Wall St. J., Aug. 16, 1993, at A1; cf. *Nationwide Hospital Investigation Seeks Data on Non-FDA Approved Devices*, 3 Health L. Rep. (BNA), at 836-37 (June 23, 1994) (discussing HHS's investigation, by administrative subpoenas, of hospitals nationwide).

399. *Zurcher v. Stanford Daily*, 436 U.S. 547, 557 (1978) (citing Fed. R. Crim. P. 41).

400. 387 U.S. 294 (1967).

401. 427 U.S. 463 (1976).

402. *United States v. 92 Buena Vista Avenue*, 113 S. Ct. 1126, 1133 (1993).

Almost every search in the reported health care fraud prosecutions was of a health care provider's office and almost every seizure was of patient and billing records. As chart 7 reveals, the searches were challenged on a number of grounds. This section will discuss the following three grounds: particularity and overbreadth;⁴⁰³ improper use of administrative search warrants in criminal investigations;⁴⁰⁴ and, use of private individuals to conduct searches for the government.⁴⁰⁵

403. See *infra* part VI.A.

404. See *infra* part VI.B.

405. See *infra* part VI.C.

A variety of other search and seizure issues were raised in the reported health care prosecutions. See, e.g., *United States v. Hooshmand*, 931 F.2d 725, 735 (11th Cir. 1991) (raising issue of staleness); *United States v. Dino*, 919 F.2d 72, 75-76 (8th Cir. 1990) (raising issue of consent), *cert. denied*, 112 S. Ct. 50 (1991); *United States v. Kaplan*, 895 F.2d 618, 622-23 (9th Cir. 1990) (raising issue of consent); *United States v. Hershenow*, 680 F.2d 847, 856-57 (1st Cir. 1982) (discussing privilege against self-incrimination); *United States v. Cella*, 568 F.2d 1266, 1278-84 (9th Cir. 1990) (raising issue of standing); *United States v. Warren*, 453 F.2d 738, 742-43 (2d Cir.) (analyzing issue of probable cause and discussing privilege against self-incrimination), *cert. denied*, 406 U.S. 944 (1972); *United States v. Lindenfeld*, 142 F.2d 829, 831-32 (2d Cir.) (discussing scope of search incident to arrest), *cert. denied*, 323 U.S. 761 (1944); *United States v. Colletta*, 602 F. Supp. 1322, 1327 (E.D. Pa.) (discussing the patient-physician privilege), *aff'd*, 770 F.2d 1076 (3d Cir. 1985); *People v. Slocum*, 125 Cal. Rptr. 442, 447-48 (Ct. App.) (discussing the securing of premises while awaiting a warrant), *cert. denied*, 426 U.S. 924 (1976); *People v. Ekong*, 582 N.E.2d 233, 234-36 (Ill. App. Ct. 1991) (discussing patient-physician privilege); *Commonwealth v. Slaton*, 608 A.2d 5, 6-10 (Pa. 1992) (raising issue of consent); *Commonwealth v. West*, 396 A.2d 380, 383 (Pa. 1978) (raising issue of consent); *Sorce v. State*, 736 S.W.2d 851, 858 (Tex. Ct. App. 1987) (analyzing the sufficiency of probable cause); *State v. Dorn*, 496 A.2d 451, 458 (Vt. 1985) (analyzing the sufficiency of probable cause).

Although this Article does not discuss the issue of staleness, the *Hooshmand* decision suggests that it is not an impediment to finding probable cause in health care prosecutions. The court held that although the information was 11 months old, probable cause was shown. 931 F.2d at 735. According to the court, "When the alleged criminal activity is ongoing . . . it is unlikely that the passage of time will dissipate probable cause." *Id.*

CHART 7: GROUNDS FOR CHALLENGING SEARCHES MADE IN
HEALTH CARE FRAUD INVESTIGATIONS

Grounds	Total Number of Cases	Cases in Which Defendant Was Successful
Lack of Particularity ⁴⁰⁶	10	1
Sufficiency of Probable Cause ⁴⁰⁷	9	0
Governmental v. Private Party Search ⁴⁰⁸	7	0
Improper Use of Administrative Warrant ⁴⁰⁹	5	0
Lack of Voluntary Consent ⁴¹⁰	4	1
Violation of Fifth Amendment Privilege ⁴¹¹	3	0
Violation of Patient-Provider Privilege ⁴¹²	2	0
Staleness of Probable Cause ⁴¹³	2	0
Improper Scope of Search Incident to Arrest ⁴¹⁴	1	0
Improper Securing of Premises ⁴¹⁵	1	0

406. See *Hooshmand*, 931 F.2d at 735-36; *United States v. Lamport*, 787 F.2d 474, 476 (10th Cir.), *cert. denied*, 479 U.S. 846 (1986); *Hershenow*, 680 F.2d at 850-52; *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980); *United States v. Hughes*, 823 F. Supp. 593, 604 (N.D. Ind. 1993); *State v. Hughes*, 433 So. 2d 88, 93 (La. 1983); *State v. Ruud*, 259 N.W.2d 567, 572 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978); *State v. Burnett*, 556 A.2d 1251, 1253 (N.J. Super. Ct. App. Div. 1989); *Dorn*, 496 A.2d at 458; *State v. DeSmidt*, 454 N.W.2d 780, 789 (Wis. 1990).

407. See *United States v. Leichtling*, 684 F.2d 553, 555-56 (8th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983); *Warren*, 453 F.2d at 742; *Hughes*, 823 F. Supp. at 598-600; *Slocum*, 125 Cal. Rptr. at 448-49; *Ruud*, 259 N.W.2d at 572; *Burnett*, 556 A.2d at 1253; *Sorce*, 736 S.W.2d at 858; *Dorn*, 496 A.2d at 459; *DeSmidt*, 454 N.W.2d at 785-86.

408. See *United States v. Miller*, 800 F.2d 129, 133-35 (7th Cir. 1986); *United States v. Lamport*, 787 F.2d 474, 475-76 (10th Cir.), *cert. denied*, 479 U.S. 846 (1986); *Hershenow*, 680 F.2d at 854-55; *United States v. Zipperstein*, 601 F.2d 281, 288-90 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *Cella*, 568 F.2d at 1282-84; *United States v. Mekjian*, 505 F.2d 1320, 1326-28 (5th Cir. 1975); *cf. Slocum*, 125 Cal. Rptr. at 446-47 (officer's probable cause derived mostly from information supplied by his nurse, a private party).

409. See *United States v. Nechy*, 827 F.2d 1161, 1164 (7th Cir. 1987); *United States v. Brown*, 763 F.2d 984, 986-87 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985); *Leichtling*, 684 F.2d at 555; *United States v. Voorhies*, 663 F.2d 30, 31 (6th Cir. 1981), *cert. denied*, 456 U.S. 929 (1982); *Commonwealth v. Slaton*, 608 A.2d 5, 6 (Pa. 1992).

410. See *United States v. Dino*, 919 F.2d 72, 75-76 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 50 (1991); *United States v. Kaplan*, 895 F.2d 618, 622 (9th Cir. 1990); *Slaton*, 608 A.2d at 7; *Commonwealth v. West*, 396 A.2d 380, 383 (Pa. Super. Ct. 1978).

411. See *United States v. Hershenow*, 680 F.2d 847, 855 (1st Cir. 1982); *United States v. Warren*, 453 F.2d 738, 742 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Colletta*, 602 F. Supp. 1322, 1326 (E.D. Pa.), *aff'd*, 770 F.2d 1076 (3d Cir. 1985).

412. See *Colletta*, 602 F. Supp. at 1326; *People v. Ekong*, 582 N.E.2d 233, 234 (Ill. App. Ct. 1991).

413. See *United States v. Hooshmand*, 931 F.2d 725, 735 (11th Cir. 1991); *State v. Burnett*, 556 A.2d 1251, 1253 (N.J. Super. Ct. App. Div. 1989).

414. See *United States v. Lindenfeld*, 142 F.2d 829, 832 (2d Cir.), *cert. denied*, 323 U.S. 761 (1944).

415. See *People v. Slocum*, 125 Cal. Rptr. 442, 448 (Ct. App. 1975), *cert. denied*, 426 U.S. 924 (1976).

The defendants did not enjoy much success in challenging the searches and seizures. Suppression of seized evidence was obtained in only four percent (two) of the cases where evidence was obtained through a search.⁴¹⁶ Undoubtedly, this sample of health care fraud cases does not accurately reflect defendants' true rate of success in suppressing evidence obtained by searches because the government often dismisses a case after its evidence has been suppressed⁴¹⁷ and thus such a case would not be included in the sample of cases studied herein. While recognizing this probable sample bias, it is still helpful to examine the search and seizure issues raised in the reported health care fraud prosecutions and how the courts resolved them.

A. *Particularity and Overbreadth in Search Warrants*

A common challenge made by defendants to evidence seized during the health care fraud investigations was that the search warrant's description of evidence to be seized was not sufficiently particular.⁴¹⁸ The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."⁴¹⁹ According to the Supreme Court, "[N]othing is left to the discretion of the officer executing the warrant."⁴²⁰ If probable cause truly exists for a search, particularly describing the items to be seized should not be difficult. In a drug investigation, for example, the government should be able to list, in the search warrant, the types of drugs its agents expect to find. Similarly, in an investigation for receipt of a shipment of stolen property, if probable cause truly exists, the government should be able to specify the property its agents expect to find. In each of these cases, as in most criminal cases, the particularity requirement flows naturally from the probable cause. In white collar criminal cases, however, where voluminous documents of a complex fraud are to be seized, it is not always possible to describe particularly the items to be seized even when clear and strong probable cause exists to believe evidence of a crime will be found. As noted by Judge Campbell of the First Circuit:

416. See *United States v. Abrams*, 615 F.2d 541, 550 (1st Cir. 1980); *Commonwealth v. Slaton*, 608 A.2d 5, 10 (Pa. 1992).

417. Cf. U.S. Dep't of Justice, *The Dep't of Justice Manual* 2 § 1.000 (1994) (providing Solicitor General with power to determine which cases will be appealed).

418. The defendants challenged search warrants on grounds of particularity in the following cases: *United States v. Hooshmand*, 931 F.2d 725, 735-36 (11th Cir. 1991); *United States v. Hershenow*, 680 F.2d 847, 850-51 (1st Cir. 1982); *Abrams*, 615 F.2d at 543; *United States v. Hughes*, 823 F. Supp. 593, 602-03 (N.D. Ind. 1993); *State v. Hughes*, 433 So. 2d 88, 91-92 (La. 1983); *State v. Burnett*, 556 A.2d 1251, 1253-54 (N.J. Super. Ct. App. Div. 1989); *State v. Dorn*, 496 A.2d 451, 458-59 (Vt. 1985); *State v. DeSmidt*, 454 N.W.2d 780, 783-84 (Wis. 1990). The courts rejected the defendants' challenges in every case except *Abrams*, 615 F.2d at 543.

419. U.S. Const. amend. IV.

420. *Marron v. United States*, 275 U.S. 192, 196 (1927).

[N]eed for particularization gives rise to a dilemma in fraud investigations. The investigators usually do not, and often cannot, know in advance precisely what they will find when they search through files pursuant to a warrant.⁴²¹

The discussions by several of the courts confronting the particularity issue in health care fraud prosecutions are illustrative. *United States v. Abrams*⁴²² is one of the few reported health care fraud prosecutions where evidence was suppressed because of the government's failure to particularly describe the items to be seized. The First Circuit affirmed the trial court's suppression of Medicaid records that had been seized pursuant to a search warrant executed at the defendant's medical office.⁴²³ The warrant authorized seizure of "certain business and billing and medical records of patients . . . which show actual medical services performed and fraudulent services claimed to have been performed."⁴²⁴ The First Circuit held that this description was insufficiently particular.⁴²⁵

The *Abrams* court offered two alternatives to relaxing the particularity requirement in complex fraud cases, neither of which appears feasible. First, the court suggested that officers be instructed to seize only the files in which the billing records revealed fraud.⁴²⁶ Presumably in this way the officers could comply with the search warrant's description of records. This suggestion is not workable in most fraud cases because, as noted, the fraud rarely will be apparent from a simple or quick on-site examination. Generally, a comparison of multiple documents is necessary to determine whether fraud has occurred. Such an examination can be extremely time consuming, and may need to be conducted by experts in a location of privacy.⁴²⁷ Creating these conditions at a target's place of business during the execution of a search warrant would be disruptive, if even possible. The second suggestion by the *Abrams* court, more implicit than the first, is that the government should use subpoenas rather than search warrants.⁴²⁸ This suggestion ignores the fact that there are advantages to both par-

421. *Abrams*, 615 F.2d at 548 (Campbell J., concurring). In *Andresen v. Maryland*, 427 U.S. 463 (1976), the Supreme Court noted that:

The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.

Id. at 481 n.10.

422. 615 F.2d 541.

423. *Id.* at 542.

424. *Id.* at 546-47.

425. *Id.* at 547.

426. *Id.* at 545-46.

427. See *United States v. Hughes*, 823 F. Supp. 593, 602-05 (N.D. Ind. 1993).

428. 615 F.2d at 547 ("In a case involving the detailed examination of voluminous business records of a person being investigated for possible criminal activity, the usual method for obtaining such records is by subpoena.").

ties when evidence is obtained with a search warrant. A defendant is guaranteed a showing of probable cause before a neutral and detached magistrate with a search warrant.⁴²⁹ The government is guaranteed security from destruction or alteration of documents as well as flexibility from the grand jury disclosure prohibitions.⁴³⁰

In contrast to *Abrams* are decisions in health care fraud cases from eight other federal and state courts.⁴³¹ *State v. Hughes*⁴³² typifies the approach taken by these courts. The defendants, dentists, were indicted on fraud charges arising from inflated bills they submitted to insurers for services rendered to patients. During the investigation that preceded the filing of charges, the government executed a search warrant at the defendants' dental office, seizing patient treatment records, insurance claim forms, laboratory work orders, daily ledger sheets, and fee schedules.⁴³³ The defendants challenged this search on the ground that the description of the items to be seized was insufficiently particular. The Supreme Court of Louisiana began its analysis by noting that "the particularity requirement must be applied with a practical margin of flexibility."⁴³⁴ After discussing the difficulties of investigating complex white collar crimes, the court noted that "a careful balance must be struck between the need for particularity and the need for the known documents in business record seizure situations."⁴³⁵ Finding that the "facts . . . in the . . . affidavit clearly indicate a pervasive scheme to defraud at the dental clinic,"⁴³⁶ the court held that the warrant met the Fourth Amendment's particularity requirement.⁴³⁷

The approach of the *Hughes* court is more appropriate than that of the *Abrams* court. By requiring the government to show probable cause that a crime was committed, that the defendant's business was permeated with fraud, and that the records generically described in the warrant were relevant to the suspected fraud, the *Hughes* court relaxed Fourth Amendment particularity requirements in an appropri-

429. See *supra* note 390 and accompanying text.

430. In its comments on use of subpoenas vis à vis search warrants, the *Abrams* court acknowledged that "the issue of a subpoena always entails the risk that the records will be tampered with or even destroyed before they are delivered." 615 F.2d at 547.

431. See *United States v. Hooshmand*, 931 F.2d 725, 735-36 (11th Cir. 1991); *United States v. Lamport*, 787 F.2d 475, 476 (10th Cir.), *cert. denied*, 479 U.S. 846 (1986); *United States v. Hershenow*, 680 F.2d 847, 852 (1st Cir. 1982); *United States v. Hughes*, 823 F. Supp. 593, 602-04 (N.D. Ind. 1993); *State v. Hughes*, 433 So. 2d 88, 92 (La. 1983); *State v. Ruud*, 259 N.W.2d 567, 573-74 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978); *State v. Dorn*, 496 A.2d 451, 458 (Vt. 1985); *State v. DeSmidt*, 454 N.W.2d 780, 789 (Wis. 1990).

432. *Hughes*, 433 So. 2d at 88.

433. *Id.* at 90.

434. *Id.* at 92.

435. *Id.*

436. *Id.* at 91.

437. *Id.* at 93.

ate balance between the unique problems encountered in investigations of white collar crime and the Fourth Amendment's reasonableness and particularity requirements.

Several of the reported health care fraud prosecutions also addressed the related issue of overbreadth, which pertains to whether records not described in the warrant may also be seized. Each of the courts addressing the issue upheld the seizure of all records taken.⁴³⁸ *State v. DeSmidt*⁴³⁹ exemplifies one approach taken by these courts. DeSmidt, a dentist charged with medical assistance and insurance fraud,⁴⁴⁰ won a pretrial motion to suppress the seizure of business records and patient files taken from his dental offices pursuant to a search warrant. The Wisconsin Supreme Court reversed.⁴⁴¹ The warrant authorized the search and seizure of the following items: "Patient charts and dental records, recording, among other things, services actually performed . . . [and] business records . . ."⁴⁴² Pursuant to the warrant, the investigators seized twenty-two boxes of materials including all of the defendant's business records and patient files for the six years preceding the search.⁴⁴³

DeSmidt argued that this seizure should have been limited to records associated with the specific instances of alleged fraud detailed in the affidavit.⁴⁴⁴ Noting that "in cases involving a complex scheme to defraud, a criminal investigation may require piecing together, like a jigsaw puzzle, a number of bits of evidence,"⁴⁴⁵ the court upheld the seizure.⁴⁴⁶ Key to the court's analysis was the fact that "there was probable cause to believe [that] Dr. DeSmidt's dental practice was 'permeated with fraud.'"⁴⁴⁷ When the fraud is so pervasive, "all the records of a business may be seized."⁴⁴⁸ Some of the key facts demonstrating the pervasiveness of DeSmidt's scheme to defraud were: (1) specific allegations by a credible former employee that the filing of false claims was a "common practice" performed "routinely"; (2) the defendant's practice of filing false claims extended to private insur-

438. See, e.g., *United States v. Hooshmand*, 931 F.2d 725, 736 n.12 (11th Cir. 1991) (finding appropriate the seizure of patient's files not covered by search warrant because case involved a "pervasive scheme to defraud"); *State v. Dorn*, 496 A.2d 451, 459-60 (Vt. 1985) (finding that under the circumstances, the phrase "drug price listings" as defined in the affidavit was sufficiently specific and the evidence was properly seized); *State v. DeSmidt*, 454 N.W.2d 780, 784-89 (Wis. 1990) (holding that seizure of all business records may be constitutional even if business is legitimate if all of a business' records are relevant to a particular crime).

439. *DeSmidt*, 454 N.W.2d at 780.

440. *Id.* at 783.

441. *Id.* at 782.

442. *Id.* at 783.

443. *Id.*

444. *Id.* at 787.

445. *Id.* at 786.

446. *Id.* at 788-89.

447. *Id.* at 784.

448. *Id.* at 786.

ance as well as Medicaid claims; and (3) the defendant was "training" his employees how to submit false claims.⁴⁴⁹

The Vermont Supreme Court reached a similar conclusion, but with different reasoning in *State v. Dorn*.⁴⁵⁰ Dorn, a pharmacist convicted of Medicaid fraud,⁴⁵¹ sought suppression of non-Medicaid prescriptions seized pursuant to a search warrant authorizing the search and seizure of "prescriptions and prescription records for Medicaid recipients."⁴⁵² Acknowledging that the officers exceeded the scope of the items listed in the warrant, the court nevertheless held that the non-Medicaid prescriptions were properly seized as a "plain view" exception to the warrant requirement. In collecting the Medicaid prescriptions authorized in the warrant, the seizing officers noticed that Medicaid and non-Medicaid patients had been charged different prices for the same item. According to the court, the officers then had probable cause to believe that another fraud upon private insurers had been committed. Because the non-Medicaid records were evidence of this crime, they were properly seized.⁴⁵³

Few searches in white collar cases will meet *Dorn's* standard. Two facts were present in *Dorn* that may not occur in many white collar criminal investigations. First, and less significant, the agents in *Dorn* gained access to the documents not described in the warrant while searching for the documents that were described.⁴⁵⁴ Such commingling of documents may occur in health care fraud prosecutions, as when all patient charts are jointly filed, but such commingling is not likely in all white collar cases or even in all health care fraud prosecutions. The second fact is more significant. In *Dorn*, the agents were able to determine, from a cursory look at records not listed in the search warrant, that the records were evidence of a fraud additional to the one they were investigating.⁴⁵⁵ The ability to determine that additional frauds are being committed from such a cursory examination is unusual and will not occur in many white collar criminal cases.⁴⁵⁶ Thus, the more common rationale for sanctioning the seizure of addi-

449. *Id.* at 788.

450. 496 A.2d 451 (Vt. 1985).

451. *Id.* at 453.

452. *Id.* at 457.

453. *Id.* at 459.

454. *Id.* at 459 ("In order to carry out the search, the officers had to look at the various documents within each box in which the records were kept. 'In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized.' " (quoting *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976))).

455. *Id.* at 459 ("The [trial] court . . . found that the officers realized, in sorting the prescriptions, that Medicaid and non-Medicaid customers had been charged different prices for identical items. At that time, the court held, the officers had probable cause to believe a crime had been committed, of which the non-Medicaid records constituted evidence.").

456. See, e.g., *United States v. Hughes*, 823 F. Supp. 593, 604 (N.D. Ind. 1993) (ruling that seizure of all records and pacemakers from defendant's office was proper,

tional records to those listed in a search warrant is that offered by the court in *DeSmidt*: in complex cases where there is probable cause to believe a business is "permeated with fraud,"⁴⁵⁷ the Fourth Amendment permits seizure of more records than those listed in a warrant.

In conclusion, the reported health care fraud prosecutions reveal the courts' struggle to fit sophisticated crimes into established Fourth Amendment doctrine. Most of these courts, as shown in the *Hughes*, *DeSmidt* and *Dorn* cases, have relaxed Fourth Amendment particularity requirements to accommodate the realities of investigations of sophisticated crimes. They have done so appropriately and consistently with constitutional requirements. The Fourth Amendment requires only reasonable searches.⁴⁵⁸ In complex fraud cases, however, it is not reasonable to require the government to fully describe a crime until far into an investigation. It is reasonable to expect the government to describe generally the records that are relevant to a suspected crime and to permit seizure of more records than those described in the warrant only upon a showing of pervasive fraud. Relaxing the particularity requirement is not abandoning Fourth Amendment protection; the government must still demonstrate probable cause to believe that a crime has been committed and that documents which are evidence of this crime will be found in the place to be searched. Further, if the government seizes more documents than are described in the warrant,

even though not all such documents and items would be evidence of fraud). The court also noted:

The business records and documentation in the alleged criminal scheme also militates against specificity insofar as it would not be readily apparent to the investigating officers which documents were legitimate and which were those used to effectuate the alleged crimes [I]f those executing the search were to conduct the search of the entire premises, taking the time to ascertain which pacemakers and accompanying documents and business records were part of the alleged criminal activity, and which were not, the search could have lasted several days. The underlying supposition is that a whole-sale seizure of all property of a certain ilk for subsequent filtering and classification elsewhere is less intrusive and more feasible than an extended police presence for a substantial period of time upon the premises searched.

Id.

457. 454 N.W.2d 780, 784 (Wis. 1990).

458. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."). In an excellent article, Professor Tracey Maclin discusses the evolution of the "reasonableness" standard in Fourth Amendment jurisprudence. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 201-02. (1993). In particular, Professor Maclin suggests that the Supreme Court's current view of "reasonableness," that it simply means that police officers shall not act irrationally, fails to take into account the history, and current need, to protect citizens from improper uses of police power. *Id.* at 201-02. Professor Maclin's review of the reasonableness standard is helpful here. As the author points out, "Whether a particular search or seizure is reasonable is generally determined by balancing the competing interests at stake—the government's interest in effective law enforcement versus the individual's interest in privacy and personal security." *Id.* at 199.

it must show probable cause to believe that there exists a pervasive scheme to defraud.

B. *Administrative Warrants in Criminal Investigations*

In traditional criminal law cases, it is well settled that an administrative warrant, with its reduced requirements of probable cause and particularity, may be used for administrative searches.⁴⁵⁹ Once an investigation focuses on criminal liability, however, the full Fourth Amendment warrant requirements must be met.⁴⁶⁰ This principle of law presumes that an investigation is *either* administrative *or* criminal and that it is possible to know which it is. In regulated industries, however, use of administrative warrants to collect evidence of criminal conduct is permissible. *New York v. Burger*⁴⁶¹ demonstrates this point. Upholding an administrative search of an automobile junkyard that yielded evidence of criminal activity, the Supreme Court noted: "Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search . . . have lessened application in this context."⁴⁶² Most white collar crime occurs in "closely regulated industries." The heavy use of administrative warrants in health care fraud prosecutions exemplifies this.

For example, in *United States v. Leichtling*,⁴⁶³ DEA agents applied to a federal magistrate to search and seize evidence of suspected drug offenses from Leichtling's home. The agents executed this warrant and found incriminating evidence.⁴⁶⁴ Thereafter, but on the same day, agents went to Leichtling's dental office with an administrative search

459. *Camara v. Municipal Ct. of San Francisco*, 387 U.S. 523, 537-39 (1967).

460. *Michigan v. Tyler*, 436 U.S. 499, 507-08 (1978) (holding that an administrative warrant is sufficient for fire fighters to obtain if entering premises to perform a routine investigation of a fire). The court noted, however, that "if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime." *Id.* at 512 (citing *United States v. Ventresca*, 380 U.S. 102, 106-07(1965)).

Subsequent Supreme Court opinions have cast doubt on the firmness of this holding although none have directly overruled it. In another fire investigation case, for instance, a majority of the Justices found that no warrant was needed for any investigation that occurs within a reasonable time after the fire. *Michigan v. Clifford*, 464 U.S. 287, 293 (1984); *see also O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987) (considering the reasonable expectation of privacy and the burdens of requiring a warrant).

461. 482 U.S. 691 (1987).

462. *Id.* at 702 (citation omitted).

463. 684 F.2d 553, 554 (8th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983).

464. *Id.* at 555 (involving agents who seized two bottles of cocaine from the defendant's bedroom dresser, as well as a scale and one bottle of "cocaine hydrochloride" from the defendant's automobile which was parked outside his house).

warrant for dental records, which they seized.⁴⁶⁵ The records were used by the government to convict Leichtling of drug offenses. Similarly, in *United States v. Voorhies*,⁴⁶⁶ DEA compliance agents seized patient medical charts from the defendant's office pursuant to an administrative warrant, and later used these records to convict Voorhies of controlled substance offenses.⁴⁶⁷ Finally, in *United States v. Brown*,⁴⁶⁸ criminal investigators accompanied auditors who reviewed Brown's prescription books and records from his pharmacy. Evidence from this review was used to convict Brown, a pharmacist, of Medicaid fraud.⁴⁶⁹

In only one of the reported health care fraud prosecutions was the defendant successful in suppressing evidence on the ground that an administrative warrant was impermissibly used to gather evidence of a crime. In *Commonwealth v. Slaton*,⁴⁷⁰ narcotics agents inspected Slaton's pharmacy three times pursuant to standard administrative inspection procedures. They then obtained a search warrant for the pharmacy.⁴⁷¹ During these initial inspections, which were conducted to investigate one of Slaton's customers, the agents began to suspect Slaton of illegally distributing controlled substances through forged prescriptions.⁴⁷² The Supreme Court of Pennsylvania held that as soon as they began suspecting Slaton of criminal wrongdoing, the agents should have obtained either Slaton's consent or a search warrants upon a full showing of probable cause and particularity.⁴⁷³ Because they did not, these improper inspections tainted the search warrant later properly obtained and necessitated suppression of the evidence.⁴⁷⁴ The *Slaton* court distinguished *Burger* on the ground that the agents in *Burger* were conducting a routine inspection and coincidentally discovered evidence of criminal activity whereas the only purpose of the agents in *Slaton* was to investigate alleged criminal activity.⁴⁷⁵

The presumption in the *Slaton* opinion is a commendable effort to sift through Fourth Amendment issues. Its presumption that there is a clear line dividing civil and criminal investigations, however, is too rigid for white collar criminal cases. Other cases recognize this. For example, in *United States v. Nechy*,⁴⁷⁶ the United States Court of Ap-

465. *Id.* at 555 (agents seizing records and samples of the defendant's mouthwash solutions at the defendant's dental office).

466. 663 F.2d 30 (6th Cir. 1981), *cert. denied*, 456 U.S. 929 (1982).

467. *Id.* at 31.

468. 763 F.2d 984, 986 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985).

469. *Id.* at 987.

470. 608 A.2d 5 (Pa. 1992).

471. *Id.* at 6.

472. *Id.*

473. *Id.* at 10.

474. *Id.*

475. *Id.* at 8.

476. 827 F.2d 1166 (7th Cir. 1987).

peals for the Seventh Circuit upheld the constitutionality of an administrative search conducted to gather evidence of criminal wrongdoing because the defendant's conduct was subject to both criminal and civil liability. Nechy, also a pharmacist, was convicted of possession with intent to distribute and distributing controlled substances.⁴⁷⁷ Evidence used against Nechy in his criminal trial was obtained during a search conducted by a civil investigator with an administrative search warrant.⁴⁷⁸ Nechy argued that the "administrative search had been merely a subterfuge for obtaining evidence of criminal guilt."⁴⁷⁹ Recognizing that the "ulterior purpose [of the administrative search] was to obtain evidence of a criminal violation,"⁴⁸⁰ the court nevertheless held that the search was proper because of "the elaborate regulatory system" that permits the government to use both civil and criminal tools to investigate pharmacies, regardless of which liability ultimately is attached.⁴⁸¹

Some courts have upheld the use of administrative searches and inspections to collect evidence to prove criminal liability on a "consent" theory.⁴⁸² The United States Court of Appeals for the Eighth Circuit held in *United States v. Brown*⁴⁸³ that it is constitutionally permissible to require a health care provider to agree to reasonable warrantless inspections of the pharmacy records in exchange for obtaining the benefits of the Medicaid program.⁴⁸⁴

In conclusion, courts have struggled with the hybrid civil/criminal nature of white collar crime in ruling on the use of administrative search warrants to gather evidence of criminal liability. Some courts, as demonstrated by *Slaton*,⁴⁸⁵ strive to maintain a bright line between criminal and civil liability, suppressing evidence in criminal cases obtained through civilly obtained warrants. Other courts, typified by *Nechy*,⁴⁸⁶ recognize the hybrid nature of white collar crime and hold that it does not matter if civil or criminal investigative methods are employed when investigating conduct subject to both types of regulation, as long as applicable procedures for the avenue used are met. An optional analysis is that typified by *Brown*,⁴⁸⁷ which does not delve into the nature of the conduct or investigative method but simply finds

477. *Id.* at 1163.

478. *Id.* at 1163-64.

479. *Id.* at 1164.

480. *Id.* at 1166.

481. *Id.*

482. See *United States v. Brown*, 763 F.2d 984 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985); *United States v. Griffin*, 555 F.2d 1323 (5th Cir. 1977).

483. *Brown*, 763 F.2d at 984.

484. *Id.* at 987-88.

485. *Commonwealth v. Slaton*, 608 A.2d 5 (Pa. 1992).

486. *United States v. Nechy*, 827 F.2d 1161 (7th Cir. 1987).

487. *United States v. Brown*, 763 F.2d 984 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985).

consent to searches, both civil and criminal, upon enrolling in government programs.

Of the three analyses, the optimal approach is that of the Seventh Circuit in *Nechy* because it acknowledges the hybrid character of white collar crime. At a minimum, the diverse treatment of this issue suggests that the use of administrative warrants in internal investigations is an area of law ripe for stronger arguments by the litigants, especially by the defense, as well as sharper clarification by the courts.

C. Private Party Searches

As the Supreme Court has noted, the Fourth Amendment's prohibition against unreasonable searches and seizures "proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."⁴⁸⁸

Six of the health care fraud cases where searches were executed concern searches conducted by an employee or associate of the defendant.⁴⁸⁹ In each case the court found that the search was conducted by a private party and outside the purview of the Fourth Amendment. The courts did so on two different grounds. *United States v. Cella*⁴⁹⁰ demonstrates one approach. Cella and administrators of hospitals were convicted for submitting false cost reports to Medicare.⁴⁹¹ Some of the government's evidence at trial came from documents removed by an employee from one of the involved hospitals. At the time this employee removed the records, he had agreed to supply the government with information about hospital activity but he had also been told not to remove any documents without being instructed to do so.⁴⁹² Within a week of receiving these directions the employee removed print shop negatives and paste-ups on his own ac-

488. *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting) (citing *Burdeau v. McDowell*, 256 U.S. 465, 467 (1921)).

489. See *United States v. Lamport*, 787 F.2d 474, 475-76 (10th Cir.), *cert. denied*, 479 U.S. 846 (1986); *United States v. Hershenow*, 680 F.2d 847, 854-56 (1st Cir. 1982); *United States v. Zipstein*, 601 F.2d 281, 288-90 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *United States v. Cella*, 568 F.2d 1266, 1271-77 (9th Cir. 1977); *United States v. Mekjian*, 505 F.2d 1320, 1323, 1326-28 (5th Cir. 1975); cf. *People v. Slocum*, 125 Cal. Rptr. 442, 447 (Ct. App. 1975) (failing to distinguish private from governmental parties where a private party contributed information to give probable cause to search the defendant's residence), *cert. denied*, 426 U.S. 924 (1976).

United States v. Miller, 800 F.2d 129 (7th Cir. 1986), presents a private party's access-to-records issue in another context. The defendant's employee produced the defendant's records pursuant to a subpoena. *Id.* at 132-33. The court considered whether the employee had sufficient authority over the records to serve as "custodian" for purposes of complying with the subpoena, ultimately finding that he was a sufficient custodian. *Id.* at 135.

490. 568 F.2d 1266.

491. *Id.* at 1270.

492. *Id.* at 1273.

cord and without instructions to do so.⁴⁹³ The United States Court of Appeals for the Ninth Circuit bypassed the question of whether this employee was acting as a government agent when he took these documents. Instead, the court found no Fourth Amendment violation on the ground that the documents were abandoned by the defendant at the time they were taken because the defendant earlier had instructed this employee to destroy the records.⁴⁹⁴

In *United States v. Zipperstein*,⁴⁹⁵ *United States v. Mekjian*,⁴⁹⁶ and *United States v. Lamport*,⁴⁹⁷ the courts employed a different analysis of the searches by employees. In each of these cases, employees of the defendants became suspicious, conducted their own investigations, including taking possession of records, then contacted law enforcement authorities and turned documents over to the government. In each of these cases, the crucial question was whether the respective employees came into possession of the documents through "legitimate means" and decided to give them to law enforcement officials "on [their] own volition."⁴⁹⁸ Answering both questions in the affirmative, the courts in all three cases held that the searches were conducted by private parties without intervention from the government and thus were not subject to exclusion under the Fourth Amendment.⁴⁹⁹

Unlike the issues of particularity and use of administrative warrants, the issue of private party searches does not appear to be affected by the fact that a criminal case concerns a white collar crime. The only unique aspect of private party searches in white collar criminal cases may be that this issue arises relatively often because insiders are an essential and frequent source of evidence in fraud cases.⁵⁰⁰

D. Conclusion

Searches, usually of a health care provider's office or home, were employed in the reported health care fraud prosecutions surprisingly often, given other available avenues for obtaining evidence. A common, but unsuccessful, challenge made by defendants against the searches was that the search warrant did not particularly describe the items to be seized as required by the Fourth Amendment. The courts

493. *Id.* at 1273-74.

494. *Id.* at 1283-84.

495. 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980).

496. 505 F.2d 1320 (5th Cir. 1975).

497. 787 F.2d 474 (10th Cir.), *cert. denied*, 479 U.S. 846 (1986).

498. *Zipperstein*, 601 F.2d at 289; *cf. Lamport*, 787 F.2d at 475-76 (questioning whether employee acted unilaterally without encouragement by officers); *Mekjian*, 505 F.2d at 1326-27 (stating that question of admissibility arises only when government becomes aware of employee's search and seizure activities).

499. *See Lamport*, 787 F.2d at 476; *Zipperstein*, 601 F.2d at 290; *Mekjian*, 505 F.2d at 1328.

500. *See Bucy, Fraud By Fright*, *supra* note 5, at 901, 929-30, 932 (commenting that insiders are frequent witnesses in proving health care fraud).

almost uniformly rejected this challenge, holding that particularity requirements should be relaxed in complex cases where investigators often cannot know in advance exactly what they are searching for. A potential challenge not raised regularly by defendants, although the facts would have supported it, is that the use of administrative search warrants to investigate criminal liability is improper. Three approaches were taken by the courts where the defendants did raise this issue: (1) suppression was granted on the ground that civil search warrants should not be employed in criminal cases; (2) suppression was denied on the ground that it is unimportant whether criminal or civil liability is at stake as long as all requirements for the search are met; and (3) suppression was denied on the ground that participants in government programs consent to searches as a condition of participation. A third challenge raised by defendants to searches conducted in the reported health care fraud prosecutions arose where the search was conducted by a private party. Although defendants attempted to convince the courts that the search was at the direction of government agents, they were never successful with this argument.

Thus, examination of defense challenges to searches reveals that such challenges were almost uniformly unsuccessful. On two issues especially, interpretation of the particularity requirement and assessing the use of administrative warrants, the courts seemed especially willing to grant the government flexibility and deference. These courts cited the unusual nature of white collar crime when doing so.

VII. PRIVILEGE ISSUES

Privilege issues are another common problem encountered in prosecuting health care fraud. In particular, the Fifth Amendment privilege against self-incrimination and the existence of the patient-physician privilege impact both evidentiary issues and prosecutorial tactics in these cases.

A. *Fifth Amendment*

The major Fifth Amendment issues arising in health care fraud prosecutions concern the self-incrimination rights of fictional entities and the subsequent impact of statements given in parallel or administrative proceedings. Although a limited Fifth Amendment privilege may be available in some white collar criminal cases for business records of some fictional entities, even this limited privilege probably is not available in health care fraud cases.

Individual health care providers, like other individuals, are entitled to a Fifth Amendment privilege not to incriminate themselves through oral statements or testimony.⁵⁰¹ Although not entitled to a Fifth

501. See *Bellis v. United States*, 417 U.S. 85, 87 (1974) ("It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimi-

Amendment privilege for business records, individual providers are entitled to a Fifth Amendment privilege for personal records.⁵⁰² Corporate providers, by comparison, hold no Fifth Amendment privilege for any records or even any oral statements or testimony by corporate representatives.⁵⁰³ In recent years the Supreme Court has carved out a limited Fifth Amendment privilege applicable in some white collar criminal cases.⁵⁰⁴ In *United States v. Doe*⁵⁰⁵ and *Braswell v. United States*,⁵⁰⁶ the Supreme Court held that business records of individuals and sole proprietorships are entitled to a Fifth Amendment privilege as to the act of producing subpoenaed records.⁵⁰⁷ In some cases, incriminating information may be conveyed simply by the act of producing the required records. The person producing such records testifies that the records exist, that they are in his or her possession, and that the records produced are those requested.⁵⁰⁸

Realistically, a Fifth Amendment privilege as to the act of production may not amount to much, even for individuals or sole proprietors. The government can easily circumvent the privilege, for instance, when it issues a subpoena duces tecum to a custodian other than the sole proprietor,⁵⁰⁹ or when it grants immunity for the act of production.⁵¹⁰ Nevertheless, whatever protection is otherwise available to individuals and sole proprietorships for the act of producing subpoenaed records, the privilege is probably inapplicable to most health care fraud providers. As noted in *United States v. Rosenberg*,⁵¹¹ in which the court rejected the defendant-physician's assertion of a Fifth Amendment privilege as to the medical files of his patients:

nation protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony.”).

502. In both *Fisher v. United States*, 425 U.S. 391, 409-10 (1976) and *Bellis*, 417 U.S. at 87, the Supreme Court held that business papers are not entitled to Fifth Amendment protection, whether in the possession of an individual, *Fisher*, 425 U.S. at 409-10 & n.11, or a partnership, *Bellis*, 417 U.S. at 87. In reaching these decisions, the Supreme Court stressed several factors, including the fact that the records were stored at the place of business, *Bellis*, 417 U.S. at 99; that there was no “pre-existing relationship of confidentiality” regarding the records, *id.* at 101; and that the records were prepared voluntarily, *Fisher*, 425 U.S. at 409-10.

503. See *Braswell v. United States*, 487 U.S. 99, 104 (1988); *United States v. Doe*, 465 U.S. 605, 612-14 (1984); *Fisher*, 425 U.S. at 409-10.

504. See *Braswell*, 487 U.S. at 103-04; *Bellis*, 417 U.S. at 88-90.

505. 465 U.S. 605.

506. 487 U.S. 99.

507. *United States v. Doe*, 465 U.S. 605, 612-14 (1984); cf. *Braswell*, 487 U.S. at 104 (stating that while corporations are not protected, individuals are).

508. *Doe*, 465 U.S. at 613 & n.11.

509. *United States v. Radetsky*, 535 F.2d 556, 568-69 (10th Cir.), cert. denied, 429 U.S. 820 (1976), overruled by 921 F.2d 994 (10th Cir. 1990). For an excellent discussion of the act of production privilege, see Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors To Go?* 54 U. Pitt. L. Rev. 405, 415-39 (1993).

510. *Braswell v. United States*, 487 U.S. 99, 116-17 (1988).

511. 515 F.2d 190, 199 (9th Cir.), cert. denied, 423 U.S. 1031 (1975).

"[T]he privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept. ' " ⁵¹² This holding is particularly important to health care providers seeking the privilege because both Medicare and Medicaid programs require providers to maintain certain records and to make them available for inspections by federal or state investigators. ⁵¹³ As such, virtually all records needed in Medicare or Medicaid fraud investigations will fall within the required-records exception to the Fifth Amendment. ⁵¹⁴ The Fifth Amendment privilege may possibly still apply in health care fraud investigations when non-Medicare or Medicaid records are sought from an individual or sole proprietor. ⁵¹⁵ This too is an unlikely scenario, however, because the private insurers can require access to records of all registered providers and because the government can

512. *Shapiro v. United States*, 335 U.S. 1, 33 (1948).

513. Medicare providers follow regulations set forth in 42 C.F.R. § 413.20(c) (1993) (provider of services must "make available . . . its fiscal and other records . . ."). The following statute and regulations pertain to Medicaid providers: 42 C.F.R. § 431.1 (1993) (establishing state plan requirements for administration of Medicaid by state agencies); 42 U.S.C. § 1396b(q) (1989) (providing for the creation of a state Medicaid fraud control unit to protect the program from fraudulent practices); *see also* 42 U.S.C. § 1396a (a)(27) (1989) (expressing intention that patient records held by Medicaid providers be subject to disclosure during a fraud investigation); 42 C.F.R. §§ 430.88(b)(1), 431.301-302 (1993) (same).

For example, as noted in *In re Rozas Gibson Pharmacy*, 382 So. 2d 929 (La. 1980), pharmacists participating in the Louisiana Medicaid program must sign the following statement on each claim for Medicaid reimbursement they submit:

I agree to adhere to the published regulations concerning pharmaceutical payments. I hereby agree to keep such records as are necessary to disclose fully the extent of services provided to individuals under the state's title XIX plan and to furnish information regarding any payments claimed for providing such services as the state agency may request for three years from the date of service.

Id. at 932 (emphasis omitted).

514. *Shapiro*, 335 U.S. at 33 ("[T]he privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"); *see also In re Grand Jury Subpoena* (Spano), 21 F.3d 226, 228 (8th Cir. 1994) (finding that an individual who keeps records required by law waives Fifth Amendment privilege against self-incrimination).

Related to the required records exception to privileges otherwise applicable, there is the "pervasively regulated industry" exception which allows access to and seizure of records when a "valid public interest" requires such access. This rationale has overcome defendant's claims of privilege or privacy interest in records. *See, e.g., United States v. Nechy*, 827 F.2d 1161, 1165 (7th Cir. 1987) (finding that defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not infringed where government established that the pharmacy handled controlled substances); *United States v. Schiffman*, 572 F.2d 1137, 1141 (5th Cir. 1978) (finding that this exception does not infringe on defendant-pharmacists' Fourth Amendment right to be free from "unreasonable" searches of his pharmacy); *State v. Welch*, 624 A.2d 1105, 1110-11 (Vt. 1992) (creating exception overcoming defendant-nurse's assertion of privacy interest over her own prescription records).

515. *See supra* text accompanying notes 502-09.

circumvent the act of production privilege through its designation of custodian or grants of immunity.⁵¹⁶

Although health care providers are not likely to benefit from the act of production privilege available in other white collar criminal cases, providers should be cognizant of their Fifth Amendment rights in both the civil and administrative arenas because statements made during these investigations or proceedings could be used against the providers in subsequent criminal cases. Although no privilege against self-incrimination exists as to civil or administrative liability, the Fifth Amendment privilege may be asserted in civil and administrative proceedings if the information given might incriminate the speaker in future criminal proceedings.⁵¹⁷ Health care providers are subject to more civil and administrative actions than are most white collar criminal defendants⁵¹⁸ because of close supervision by insurers and civil lawsuits by private citizens. Because most providers do not see themselves as future criminal defendants, they may not have the "street smarts" of many criminal defendants who recognize the hazard of speaking to any official about their activities.⁵¹⁹ Weighing against invoking the Fifth Amendment privilege in civil or administrative proceedings is the fact that it is permissible in these proceedings to draw an adverse inference from the assertion of this privilege. This leaves the health care provider with a dilemma: invoke the privilege at civil proceedings and suffer an inference of guilt, or defend by testifying at the civil proceeding but risk incrimination in possible subsequent criminal proceedings.

The reported cases reveal that most providers opted in favor of defending themselves at the civil proceeding. In *Commonwealth v. Wu*,⁵²⁰ the decision to speak up at the civil proceeding proved to be the wrong decision. Wu, a dentist, was convicted for billing the Pennsylvania Medicaid program for services he did not perform. The sole issue on appeal was whether incriminating statements made by the

516. *Commonwealth v. Wu*, 494 A.2d 7, 9 (Pa. Super. Ct. 1985) (referring to "hapless" dentist who made incriminating statements during a civil investigation of his billing).

517. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) ("The [Fifth] Amendment . . . not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").

518. *Bucy, Fraud By Fright*, *supra* note 5, at 873-74.

519. The defendant made this argument in *Wu*, 494 A.2d at 9, where the court admitted incriminating statements made by the defendant in a prior administrative hearing in the defendant's criminal prosecution for Medicaid fraud: "[T]he argument in the instant case seems to be that the Commonwealth, under the guise of a 'good faith' civil investigation, procured incriminating statements from the hapless doctor." *Id.* Acknowledging that "[s]o viewed, [the defendant's] failure to assert his rights is understandable," the court nevertheless found the statements to be voluntarily given during a good faith civil investigation, and thus admissible. *Id.*

520. 494 A.2d 7.

defendant during an administrative investigation could be used against him at his criminal trial.⁵²¹ The Superior Court of Pennsylvania held that the statements could be used against the defendant because they were "obtained in the course of a 'good faith' investigation by a strictly civil state agency."⁵²² Noting that there was a high degree of correlation between the state's civil investigative agency and the criminal investigative unit, such as cross-referrals and sharing of information, the court nevertheless found that this cooperative relationship did not negate the "good faith" nature of the civil investigation.⁵²³

In *United States v. Vecchiarello*,⁵²⁴ the experience of two defendants convicted on a variety of federal fraud charges for falsely holding themselves out as physicians also demonstrates the perils of parallel proceedings. At their criminal trial, highly incriminating depositions taken of the defendants in a prior civil proceeding were admitted.⁵²⁵ Neither defendant could recall the names of professors, courses, textbooks, classmates or roommates from their days in medical school. One defendant was unable to translate his alleged medical school diploma from Spanish to English even though all courses at this alleged medical school were taught in Spanish.⁵²⁶ The Court of Appeals for the District of Columbia rejected the defendants' claim that their Fifth Amendment rights were violated by the introduction of these depositions, noting that had the defendants wanted to claim their Fifth Amendment privilege in the civil trial, they should have done so.⁵²⁷ Similarly, in *State v. Carr*,⁵²⁸ a pharmacist admitted during a civil audit that he had billed for prescriptions that had not been prescribed because some of his low-income customers needed more monthly prescriptions than Medicaid would pay for.⁵²⁹ These statements were used by the government against the pharmacist in a subsequent criminal prosecution.⁵³⁰

Because business records will be sought in health care fraud investigations and because these records are not protected by the privilege against self-incrimination, the Fifth Amendment privilege will not apply to records sought in health care fraud investigations, with one pos-

521. *Id.* at 8. The statements made by the defendant during the civil investigation included the defendant's acknowledgement that he prepared or reviewed all billings generated from his dental office. Additionally, the defendant wrote a letter which accompanied and explained certain records he was supplying to the civil investigator. *Id.*

522. *Id.* at 9.

523. *Id.* at 9 n.3.

524. *United States v. Vecchiarello*, 569 F.2d 656 (D.C. Cir. 1976).

525. *Id.* at 664.

526. *Id.*

527. *Id.*

528. 861 S.W.2d 850 (Tenn. Crim. App. 1993).

529. *Id.* at 853.

530. *Id.*

sible exception. The privilege against self-incrimination is available to individuals and sole proprietors for the act of producing subpoenaed records. Health care providers practicing as individuals or sole proprietors, however, should not take comfort in this limited application of the Fifth Amendment privilege. Medicare and Medicaid and most private insurers require providers billing them to waive all privileges and permit access to records. In addition, the government can circumvent the act of production privilege through its selection of a custodian of record or by granting immunity to the custodian.

Because of the potential overlap in criminal, civil and administrative actions facing health care providers, non-corporate health care providers who retain their personal privilege not to incriminate themselves through their own testimony should consider invoking this privilege in civil or administrative proceedings where they may be called to testify. Although inviting an adverse inference from invocation of this privilege in the civil or administrative matter, doing so may prevent statements made from being used against the provider in subsequent criminal proceedings.

B. *Patient-Physician Privilege*

Often in health care fraud cases, medical information about patients is needed to prove the fraud. Such information is relevant to showing that services were not performed, that different services were performed than were billed, that reported costs have been inflated, that unnecessary services were rendered, or that necessary services were not rendered. In addition, to determine whether patterns of fraud exist, it is often necessary to review files of a provider's patients where fraud is not suspected.⁵³¹ Once patient medical files are sought, issues of patient-physician privilege arise.

The status of this privilege is in flux.⁵³² The Federal Rules of Evidence, passed in 1975, provide that "the privilege of a . . . person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."⁵³³ Most federal courts do not recognize a physician-patient privilege,⁵³⁴ although some are willing to do so in limited circumstances. Forty-one states have adopted a general physician-pa-

531. See, e.g., *State v. Dorn*, 496 A.2d 451, 459-60 (Vt. 1985) (upholding seizure of pharmacy's prescription log and non-Medicaid prescriptions even though investigation focused on fraud to the Medicaid program); *State v. DeSmidt*, 454 N.W.2d 780, 784-87 (Wis. 1990) (upholding seizure of all of dentist's patient dental and billing records even though investigation focused on fraud to the Medicaid program).

532. Cf. *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1530 (1985) (tracing the development of physician-patient privileges) [hereinafter *Privileged Communications*].

533. Fed. R. Evid. 501.

534. *Privileged Communications*, *supra* note 532, at 1533.

tient privilege.⁵³⁵ Both the federal courts, the state courts, and legislatures, however, are more willing to recognize a related privilege, that of patient-psychotherapist. All fifty states have enacted some version of this privilege⁵³⁶ and two of the federal circuits clearly recognize it.⁵³⁷ Although disagreeing on the specific rationale for these privileges,⁵³⁸ the courts in the reported health care fraud prosecutions unanimously agreed that neither of these privileges apply in criminal investigations of health care fraud.⁵³⁹ Courts are split as to

535. Laural C. Alexander, Commentary, *Should Alabama Adopt a Physician-Patient Evidence Privilege?*, 45 Ala. L. Rev. 261, 261 n.2 (1993).

536. See *Privileged Communications*, *supra* note 532, at 1539 (noting that 45 states had enacted psychotherapist-patient privileges as of 1985); see e.g., Alaska Stat. § 08.86.200 (1993) (recognizing psychologist-patient privilege); Iowa Code § 622.10 (1994) (recognizing mental health professional privilege); Neb. Rev. Stat. § 27-504 (1989) (describing mental health counselor-client relationship as falling within physician-patient privilege); S.C. Code Ann. § 44-22-90 (Law. Co-op. 1993) (recognizing psychologist-patient privilege); W. Va. Code § 27-3-1 (1993) (allowing a psychotherapist-patient privilege).

537. See *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992) (recognizing a qualified psychotherapist-patient privilege); *In re Zuniga*, 714 F.2d 632, 636-37 (6th Cir.) (recognizing a psychotherapist-patient privilege), *cert. denied*, 464 U.S. 983 (1983). Additionally, some circuits are undecided on the issue, with cases going both ways. See, e.g., *Dixon v. City of Lawton*, 898 F.2d 1443, 1450 (10th Cir. 1990) (stating that it was "[a]ssuming, without deciding, that such a privilege does exist," but finding that the privilege did not apply to the circumstances at bar); *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D. N.C. 1978) (finding that a psychotherapist-patient privilege did exist). But see *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.) (finding no psychotherapist-patient privilege in the context of grand jury investigations), *cert. denied*, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988) (finding no psychotherapist-patient privilege in federal criminal trials), *cert. denied*, 489 U.S. 1084 (1989); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.) (finding no psychotherapist privilege exists in federal criminal trials), *cert. denied*, 429 U.S. 853 (1976); *United States v. Brown*, 479 F. Supp. 1247, 1253 (D. Md. 1979) (finding no psychiatrist-patient privilege as to the production of records in the Fourth Circuit).

538. For example, there is the "utilitarian" rationale, under which patients will be more willing to communicate with their physician if they know their communications will remain confidential. Robert M. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wayne L. Rev. 609, 610 (1964). This rationale has been criticized by those who argue that the motive to get well is sufficient inducement for patients to disclose confidences to physicians. See *Privileged Communications*, *supra* note 532, at 1472.

There is also the "privacy" rationale. Here, the relationship between a patient and her physician or counselor is an intimate one in which personal information is revealed. Recognizing this privilege protects this privacy interest. Stephen A. Saltzburg, *Privileges and Professions: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 618-20 (1980).

539. See, e.g., *United States v. Colletta*, 602 F. Supp. 1322 (E.D. Pa.) (holding that the government's access to private medical records is not absolute, and as such is subject to patient's constitutional right to privacy), *aff'd*, 770 F.2d 1076 (3d Cir. 1985); *People v. Ekong*, 582 N.E.2d 233 (Ill. App. Ct. 1991) (holding that under the Supremacy Clause, federal Medicaid fraud legislation prevails over state physician-patient privileges, such that medical records are obtainable by the grand jury). These cases are consistent with existing authority. See Daniel W. Shuman & Myron F. Weiner, *The Psychotherapist-Patient Privilege* 57 (1987); *Privileged Communications*, *supra* note 532, at 1536.

whether these privileges apply in civil investigations of health care fraud.⁵⁴⁰

*People v. Ekong*⁵⁴¹ typifies the approach taken by a number of the reported health care fraud prosecutions when patient records are sought in criminal cases. Ekong, a physician targeted in a Medicaid investigation, moved to quash a grand jury subpoena duces tecum requiring him to produce certain medical records.⁵⁴² Ekong argued that the records were protected by Illinois patient-physician privilege.⁵⁴³ The court disagreed, finding that Illinois law regarding privilege conflicted with federal Medicaid laws requiring Medicaid providers to disclose patient records during fraud investigations.⁵⁴⁴ Holding that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"⁵⁴⁵ the court ruled that "under the Supremacy Clause of the United States Constitution, Article VI, the privilege fell,"⁵⁴⁶ and Ekong had to comply with the subpoena.

*United States v. Colletta*⁵⁴⁷ typifies another similar approach. Colletta, an osteopathic physician, was convicted of mail fraud for billing for more services than he rendered.⁵⁴⁸ He sought a reversal on the ground that seizure of patient medical files from his office violated the patient-physician privilege. Rejecting his argument, the court held that the "strong public policy . . . in deterring fraud" outweighed any interest served by recognizing such a privilege.⁵⁴⁹ The court also noted that the government introduced only enough information from the files as was necessary to prove the fraud.⁵⁵⁰

540. See *infra* text accompanying notes 554-60.

541. 582 N.E.2d 233 (Ill. App. Ct. 1991).

542. The subpoena sought all patient files, records and sign-in sheets of Medicaid patients treated at the medical clinic during the period of January 1, 1986 through January 15, 1991. *Id.* at 233-34.

543. *Id.* at 234.

544. *Id.* at 234-35. For the text of these statutes and regulations see *supra* note 512.

545. *Id.* at 235 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41 (1977)).

546. *Id.* at 234. This approach was also followed in *Pedroso v. State*, 450 So. 2d 902, 903 (Fla. Dist. Ct. App. 1984); *In re Grand Jury Investigation*, 441 A.2d 525, 528-31 (R.I. 1982); *State v. Washington*, 266 N.W.2d 597, 615-17 (Wis. 1978). These cases are not included in the statistical analysis discussed in this Article because they have not yet resulted in filing of formal charges.

547. 602 F. Supp. 1322 (E.D. Pa.), *aff'd*, 770 F.2d 1076 (3d Cir. 1985).

548. *Id.* at 1324.

549. *Id.* at 1327. Although the court held that there was no general federal common law physician-patient privilege, it recognized a privacy right in medical records. *Id.* It was this privacy right that the court held must give way to the public interest served by release of the records. *Id.*

550. *Id.* at 1327. The "public interest" approach in *Colletta* was also employed in several other cases. See *Whalen v. Roe*, 429 U.S. 589, 602 (1977); *In re Search Warrant* (Sealed), 810 F.2d 67, 70-73 (3d Cir.), *cert. denied*, 483 U.S. 1007 (1987); *Chidester v. Needles*, 353 N.W.2d 849, 853-54 (Iowa 1984); *Doe v. Hynes*, 428 N.Y.S.2d 810, 814 (Sup. Ct. 1980); *State v. Mark*, 597 P.2d 406, 408 (Wash. Ct. App. 1979).

Thus, either by finding that specific federal law supersedes state law recognition of the patient-physician privilege or by finding that the general public interest outweighs the privacy interest of patients, most courts find that the patient-physician privilege does not apply in criminal investigations. The one exception to this rule pertains to records of treatment for substance abuse.⁵⁵¹ In these instances, the government must obtain a court order before such records may be released,⁵⁵² even when the records are needed to investigate possible violations of criminal laws. To obtain such a court order, the government must show that the need for disclosure outweighs the injury to the patient caused by the disclosure.⁵⁵³

Disagreement among courts in the reported health care fraud prosecutions occurs when the health care investigation is a civil rather than a criminal investigation. Some courts hold that the interests served by preserving the patient-physician (or patient-psychotherapist) privilege are not outweighed by society's interest in deterring fraud when the investigation is only civil. In *Hawaii Psychiatric Society v. Arisyooshi*,⁵⁵⁴ for example, the court enjoined the state from seizing patient records from a psychologist's office through administrative inspections even though the inspections were "to determine whether a provider is genuinely entitled to reimbursement and to protect the [M]edicaid program against fraud and abuse."⁵⁵⁵ Ruling that the use of administrative search warrants, with their relaxed requirements of probable cause and particularity, infringe too greatly on the interests served by the patient-psychotherapist privilege,⁵⁵⁶ the court held that the government could overcome this privilege if it was able to obtain a criminal search warrant meeting full probable cause and particularity requirements.⁵⁵⁷

551. See 42 U.S.C. § 290dd-2(c) (Supp. 1993).

552. 42 U.S.C. § 290dd-2(b)(2)(C) (Supp. 1993).

553. *Id.*

554. 481 F. Supp. 1028 (D. Haw. 1979).

555. *Id.* at 1041 (quoting 1978 Haw. Sess. Laws § 6(a), Act 105).

556. See *id.* at 1046-1050.

557. *Id.* at 1052. Other courts may go even further. In *Board of Medical Quality Assurance v. Gherardini*, 156 Cal. Rptr. 55 (Ct. App. 1979), for example, the Court held that the patient-physician privilege barred the State Board of Medical Quality Assurance from obtaining patient records with its administrative subpoena. *Id.* at 61-62. The court held that "good cause" or "probable cause" showing "a factual exposition of a reasonable ground for the sought order" was necessary before the privilege was overcome. *Id.* at 62 (quoting *Waters v. Superior Court*, 377 P.2d 265 (Cal. 1962)). Because a showing of probable cause is necessary for agents to obtain a search warrant in a criminal investigation, under *Jones v. United States*, 362 U.S. 257 (1960), overruled by *United States v. Salvucci*, 448 U.S. 83 (1980), this court presumably would hold that the privilege would give way if a search warrant was utilized in a criminal investigation.

In dicta, the court opined that if a grand jury subpoena was used in a criminal investigation, the patient-physician privilege would give way only if probable cause was shown:

Other courts hold that the patient-physician privilege gives way whenever a health care provider is investigated for fraud, regardless of the civil or criminal character of the investigation.⁵⁵⁸ In *Camperlengo v. Blum*,⁵⁵⁹ for example, the New York State Department of Social Services sought patient records through a subpoena issued as part of an administrative investigation of billing practices. The court was not concerned with the civil or criminal nature of the investigation. Finding that " 'the public must be assured that the funds which have been set aside for [the Medicaid program] will not be fraudulently diverted into the hands of an untrustworthy provider of services,' " the court held that the patient-physician privilege was abrogated "to the extent necessary to satisfy the important public interest in seeing that Medicaid funds are properly applied."⁵⁶⁰

The view of the *Camperlengo* court, rather than that of the *Hawaii Psychiatric Society*, better suits investigations of health care fraud, or any white collar crime. As noted in the context of administrative search warrants,⁵⁶¹ tying procedural consequences to the distinction between civil and criminal investigations of white collar crimes is inappropriate. Almost every white collar crime, certainly health care fraud, is subject to both arenas of liability and often is co-investigated by civil investigators and criminal law enforcement agents. With such cases, it is not clear until the conclusion of the investigation which way a case will proceed. The concurrent jurisdiction of regulatory and law

We do not question the right of a grand jury to so investigate within its lawful sphere, yet it cannot invade the individual's zone of financial privacy except on a showing of due diligence in an attempt at service upon the individual . . . and upon a "written showing" of the equivalent of probable or good cause made to the superior court judge.

Id. (citations omitted). Thus, this court would appear to require more of a showing for a grand jury subpoena than is required in criminal cases. As the Supreme Court noted in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991), no showing of probable cause or even relevancy is necessary for a grand jury to issue a subpoena. The Court stated that "the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' " *Id.* at 297 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)).

The United States Court of Appeals for the Sixth Circuit implied that the patient-psychotherapist privilege may apply in civil investigations. In *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983), the Sixth Circuit ruled that the patient-psychotherapist privilege did not apply when records were sought in a grand jury proceeding. *Id.* at 642. By narrowly limiting its holding to criminal investigations, the court implied that it may find the privilege applicable in proceedings other than criminal. "In sum, weighing the slight intrusion on the patients' privacy interest against the need for the grand jury to conduct an effective and comprehensive investigation into alleged violation of the law, the Court concludes that enforcement of the subpoenas does not unconstitutionally infringe on the rights of the patients." *Id.*

558. *United States v. Prendergast*, 585 F.2d 69, 70-71 (3d Cir. 1978); *United States v. Goldfine*, 538 F.2d 815, 818-19 (9th Cir. 1976); *Camperlengo v. Blum*, 436 N.E.2d 1299, 1300 (N.Y. 1982).

559. *Camperlengo*, 436 N.E.2d at 1299.

560. *Id.* at 1300 (quoting *Schaubman v. Blum*, 402 N.E.2d 1133 (N.Y. 1980)).

561. See *supra* text accompanying notes 459-68.

enforcement agencies, the expertise needed to conduct the investigation, and the difficult questions concerning intent necessitate this dual character of white collar crime investigations.

Thus, although recognized in all states and even in some federal courts, the patient-physician (or patient-psychotherapist) privilege is not recognized in criminal health care fraud cases. The reported prosecutions have rejected the privilege on two grounds: the superceding of the privilege by specific federal law, or the outweighing of a patient's privacy interest by the general public interest in preventing and detecting health care fraud. The courts are divided over the applicability of the patient-physician (or patient-psychotherapist) privilege when the investigation concerns only civil liability. Some courts hold that the privilege exists; others employ the same analysis as in criminal cases and decline to recognize the privilege. Because of the hybrid civil/criminal nature of white collar crime the latter view, which does not distinguish between criminal and civil investigations, is more appropriate.

C. Conclusion

Privilege issues arise routinely in health care fraud prosecutions, but the reported cases reveal that they are almost uniformly decided against the defendants. Because corporations retain no Fifth Amendment privilege and individuals retain no Fifth Amendment privilege for business records, very little of this privilege is available in most white collar cases. The limited "act of production" privilege carved out for individuals and sole proprietors that is available in some white collar cases is not likely to be available in health care fraud prosecutions because of the "required record" exception to the Fifth Amendment. Virtually every insurer, public and private, requires that health care providers retain and make available billing and treatment records.

The patient-physician (or patient-psychotherapist) privilege similarly enjoys little recognition in health care fraud prosecutions. The reported cases unanimously rejected application of this privilege in criminal investigations. Although some courts recognize this privilege in civil fraud investigations, this Article suggests the better view recognizes the hybrid civil/criminal nature of white collar crime and rejects the assertion of the privilege in either a civil or criminal investigation.

CONCLUSION

The litigation of a white collar crime is unlike that of most criminal cases. As this Article has discussed, it more often resembles the trial of a civil matter than of a criminal matter. Evidence in a white collar criminal case consists of evidence typically seen in civil cases: documents, financial or legal expert witnesses, summary witnesses and

charts, computer-generated data, and explanations of complex financial transactions.⁵⁶² This blurring of criminal and civil law is significant for it raises the question of whether the distinction between the two arenas of justice truly exists or is a creation of convenience that needs rethinking.⁵⁶³ There is little time to debate this question, however, because white collar crime is a growing phenomenon.⁵⁶⁴

This Article has explored the impact of white collar crime's hybrid nature by examining litigation issues in one type of white collar crime: health care fraud. From this study, two observations can be made. First, with the increasing complexity of cases the evidentiary issues have become more intricate. The earliest health care fraud prosecutions involved simple charges: physicians alleged to be selling medically unnecessary prescriptions for controlled substances to make a profit.⁵⁶⁵ The evidentiary issues raised were few, and were straightforward: introduction of a few documents (prescriptions),⁵⁶⁶ testimony by medical experts,⁵⁶⁷ and perhaps, testimony from an undercover investigation.⁵⁶⁸ The current prosecutions of health care providers are complex financial frauds prosecuted with complex statutes.⁵⁶⁹ The evidentiary and procedural issues raised are varied and difficult: the scope of legal expert testimony;⁵⁷⁰ the propriety of government agents testifying as expert witnesses;⁵⁷¹ the use of influential litigation tools

562. There are other unique features of white collar crime. Because the conduct at issue in most white collar cases is memorialized in a paper trail, there is rarely a controversy over what took place or who did it. Accordingly, defenses in white collar cases focus on knowledge and intent to violate the law. There is no place in most white collar criminal cases for many of the defenses typically seen in the trial of street crimes such as alibi, duress, and mistaken identity. Also, there is a growing trend in white collar criminal cases, not seen with traditional street crimes, to dilute the *mens rea* requirement. This is seen in the increasing prosecution of regulatory offenses where strict or absolute liability suffices for criminal liability, in the willingness of courts to define "intentionally" as "reckless disregard," and in the prosecution of corporations, where current standards of criminal liability contain no *mens rea* requirement. Lastly, the fact that parallel civil and administrative proceedings often track the white collar criminal case affects the white collar criminal case in a variety of subtle ways: how the scope of investigative searches may be defined; whether and to what extent privileges exist; the availability of extrinsic act evidence; the impact on plea bargaining; and the availability of insiders and co-conspirators as government witnesses.

563. Coffee, *supra*, note 1, at 193-94.

564. White collar crime's cousin, punitive civil sanctions, is also a growing phenomenon that blurs the lines between civil and criminal law. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L. J. 1795 (1992).

565. See *supra* text accompanying notes 14-15.

566. See Bucy, *Fraud By Fright*, *supra* note 5, at 889-93.

567. *Id.* at 891-93.

568. *Id.* at 890-91.

569. Bucy, *Fraud By Fright*, *supra* note 5, at 883; see *supra* text accompanying notes 68-75.

570. See *supra* part II.A.

571. See *supra* part II.B.

such as summaries and summary witnesses;⁵⁷² and computer-generated evidence.⁵⁷³

The second observation is that courts are blending procedural and evidentiary doctrines usually kept separate in criminal and civil cases. Summaries, extrinsic act evidence, searches, and privileges exemplify this blending. Despite admonitions to keep "FRE 1006" summaries and "pedagogical" summaries separate, courts have blended the two in white collar criminal cases. Despite the limits placed on extrinsic act evidence in most cases, courts have allowed unusual flexibility in presenting such evidence in white collar criminal cases. Despite Fourth Amendment jurisprudence cautioning the use of administrative search warrants in criminal investigations, some courts are sanctioning such use. Despite recognition of Fifth Amendment and patient-physician (or patient-psychotherapist) privileges in other contexts, most courts reject these privileges when asserted in some white collar cases, especially in health care fraud prosecutions.⁵⁷⁴

Further blending is needed if the investigation and trial of white collar criminal cases is to be fair to both parties. Because of the problems presented by some of the evidence used in white collar criminal cases, such as billing experts and computer-generated evidence, defendants should be accorded greater discovery than is permitted by the rules of criminal procedure. Defendants should be allowed to issue interrogatories or depose trial witnesses who will authenticate complex evidence such as computer-generated evidence, and to *voir dire*, out of the hearing of jurors, witnesses who testify as billing experts, legal experts or experts who have also been part of the investigation or prosecution team. Defendants also should be given access to the comparative data regarding practices of the defendant and her peers. Because of complications in generating such data, access to it may be gained only through depositions or interrogatories.

Our criminal justice system originated with simple crimes provable with simple evidence. As crimes, criminals and technology have evolved, our criminal justice system must continue to evolve. White collar crime, with its hybrid criminal/civil nature is fueling part of this evolution. Experience with white collar crime suggests that a system of justice that blends civil and criminal law in some respects may better meet the goal of the civil law to provide a forum for resolution of disputes and of the criminal law to punish, deter, and isolate those individuals who violate society's most important rules.

572. See *supra* part III.

573. See *supra* part V.C.

574. See *supra* part VII.

APPENDIX I

FREQUENCY OF FRAUD THEORIES

I. Cases Prosecuted for Rx by Fraud

- United States v. Moore, 423 U.S. 122 (1975)
Direct Sales Co. v. United States, 319 U.S. 703 (1943)
Boyd v. United States, 271 U.S. 104 (1926)
Linder v. United States, 268 U.S. 5 (1925)
United States v. Behrman, 258 U.S. 280 (1922)
Moy v. United States, 254 U.S. 189 (1920), *overruled by* Funk v. United States, 290 U.S. 371 (1933)
Webb v. United States, 249 U.S. 96 (1919)
United States v. Doremus, 249 U.S. 86 (1919)
United States v. Costanzo, 4 F.3d 658 (8th Cir. 1993)
United States v. Romano, 970 F.2d 164 (6th Cir. 1992)
United States v. Hughes, 895 F.2d 1135 (6th Cir. 1990)
United States v. Kaplan, 895 F.2d 618 (9th Cir. 1990)
United States v. Splendorio, 830 F.2d 1362 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988)
United States v. Nechy, 827 F.2d 1161 (7th Cir. 1987)
United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)
United States v. Vamos, 797 F.2d 1146 (2d Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987)
United States v. Krebs, 788 F.2d 1166 (6th Cir.), *cert. denied*, 479 U.S. 930 (1986)
United States v. Norris, 780 F.2d 1207 (5th Cir. 1986)
United States v. Jackson, 761 F.2d 1541 (11th Cir. 1985)
United States v. Sanders, 749 F.2d 195 (5th Cir. 1984)
United States v. Blanton, 730 F.2d 1425 (11th Cir. 1984)
United States v. Behrens, 689 F.2d 154 (10th Cir.), *cert. denied*, 459 U.S. 1088 (1982)
United States v. Dumas, 688 F.2d 84 (10th Cir. 1982)
United States v. Leichtling, 684 F.2d 553 (8th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983)
United States v. Voorhies, 633 F.2d 30 (6th Cir. 1981), *cert. denied*, 456 U.S. 929 (1982)
United States v. Goldstein, 695 F.2d 1228 (10th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983)
United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980)
United States v. Rogers, 609 F.2d 834 (5th Cir. 1980)
United States v. Smurthwaite, 590 F.2d 889 (10th Cir. 1979)
United States v. Hill, 589 F.2d 1344 (8th Cir.), *cert. denied*, 442 U.S. 919 (1979)
United States v. Kirk, 584 F.2d 773 (6th Cir.), *cert. denied*, 439 U.S. 1048 (1978)

- United States v. Roya, 574 F.2d 386 (7th Cir.), *cert. denied*, 439 U.S. 1048 (1978)
- United States v. Schiffman, 572 F.2d 1137 (5th Cir. 1978)
- United States v. Pastor, 557 F.2d 930 (2d Cir. 1977)
- United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977)
- United States v. Fellman, 549 F.2d 181 (10th Cir. 1977)
- United States v. Elizey, 527 F.2d 1306 (6th Cir. 1975)
- United States v. Carroll, 518 F.2d 187 (6th Cir. 1975)
- United States v. Rosenberg, 515 F.2d 190 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
- United States v. Black, 512 F.2d 864 (9th Cir. 1975)
- United States v. Green, 511 F.2d 1062 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
- United States v. Larson, 507 F.2d 385 (9th Cir. 1974)
- United States v. Badia, 490 F.2d 296 (1st Cir. 1973)
- United States v. Jobe, 487 F.2d 268 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974)
- United States v. Bartee, 479 F.2d 484 (10th Cir. 1973)
- United States v. Collier, 478 F.2d 268 (5th Cir. 1973)
- United States v. Warren, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972)
- White v. United States, 399 F.2d 813 (8th Cir. 1968)
- Brown v. United States, 250 F.2d 745 (5th Cir.), *cert. denied*, 356 U.S. 833 (1956)
- Neill v. United States, 225 F.2d 174 (8th Cir. 1955)
- McBride v. United States, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956)
- Wesson v. United States, 164 F.2d 50 (8th Cir. 1947)
- United States v. Tommasello, 160 F.2d 348 (2d Cir. 1947)
- United States v. Brandenburg, 155 F.2d 110 (3d Cir. 1946)
- United States v. Abdallah, 149 F.2d 219 (2d Cir.), *cert. denied*, 326 U.S. 724 (1945)
- Mitchell v. United States, 143 F.2d 953 (10th Cir. 1944)
- United States v. Lindenfeld, 142 F.2d 829 (2d Cir.), *cert. denied*, 323 U.S. 761 (1944)
- Nigro v. United States, 117 F.2d 624 (8th Cir. 1941)
- Heller v. United States, 104 F.2d 446 (4th Cir. 1939)
- Lambert v. United States, 101 F.2d 960 (5th Cir. 1939)
- Towbin v. United States, 93 F.2d 861 (10th Cir. 1938)
- DuVall v. United States, 82 F.2d 382 (9th Cir.), *cert. denied*, 298 U.S. 667 (1936)
- MacLafferty v. United States, 77 F.2d 715 (9th Cir. 1935)
- Strader v. United States, 72 F.2d 589 (10th Cir. 1934)
- Manning v. United States, 31 F.2d 911 (8th Cir. 1929)
- Bush v. United States, 16 F.2d 709 (5th Cir. 1927)
- Aiton v. United States, 3 F.2d 992 (9th Cir. 1925)

- Manning v. United States, 287 F. 800 (8th Cir. 1923)
Barbot v. United States, 273 F. 919 (4th Cir. 1921)
Harris v. United States, 273 F. 785 (2d Cir.), *cert. denied*, 257 U.S. 646 (1921)
Hoyt v. United States, 273 F. 792 (2d Cir. 1921)
Oliver v. United States, 267 F. 544 (4th Cir. 1920)
Rothman v. United States, 270 F. 31 (2d Cir.), *cert. denied*, 254 U.S. 652 (1920)
Trader v. United States, 260 F. 923 (3d Cir.), *cert. denied*, 251 U.S. 555 (1919)
Thompson v. United States, 258 F. 196 (8th Cir.), *cert. denied*, 251 U.S. 553 (1919)
Melanson v. United States, 256 F. 783 (5th Cir. 1919)
Thurston v. United States, 241 F. 335 (5th Cir.), *cert. denied*, 245 U.S. 646 (1917)
United States v. Milicia, 769 F. Supp. 877 (E.D. Pa. 1991)
United States v. Perez-Reyes, 754 F. Supp. 637 (N.D. Ill. 1991)
United States v. Anthony, 15 F. Supp. 553 (S.D. Cal. 1936)
United States v. Fleming, 251 F. 932 (D. Pa. 1918)
State v. Jacobs, 503 P.2d 826 (Ariz. Ct. App. 1972)
People v. Nunn, 296 P.2d 813 (Cal.), *cert. denied*, 352 U.S. 833 (1956)
People v. Braddock, 264 P.2d 521 (Cal. 1953), *cert. denied*, 348 U.S. 837 (1954)
People v. Gandotra, 14 Cal. Rptr. 2d 896 (Ct. App. 1992), *cert. denied*, 114 S. Ct. 309 (1993)
People v. Lonergan, 267 Cal. Rptr. 887 (Ct. App. 1990)
People v. Kurland, 117 Cal. Rptr. 216 (Ct. App. 1973)
People v. Meyer, 31 Cal. Rptr. 285 (Ct. App. 1963)
People v. Lawrence, 18 Cal. Rptr. 196 (Ct. App. 1961)
People v. Bowman, 320 P.2d 70 (Cal. Ct. App. 1958)
Williams v. United States, 571 A.2d 212 (D.C. 1990)
Gaines v. State, 406 So. 2d 523 (Fla. Dist. Ct. App. 1981)
State v. Vinson, 298 So. 2d 505 (Fla. Dist. Ct. App. 1974), *aff'd*, 345 So. 2d 711 (Fla. 1977)
People v. Guaglita, 200 N.E. 169 (Ill.), *cert. denied*, 298 U.S. 667 (1936)
Smith v. State, 13 N.E.2d 562 (Ind. 1938)
State v. Webb, 156 N.W.2d 299 (Iowa 1968)
State v. Klingenstein, 608 A.2d 792 (Md. 1992), *aff'd in part, rev'd in part*, 624 A.2d 532 (Md. 1992), *cert. denied*, 114 S. Ct. 312 (1993)
People v. Downes, 228 N.W.2d 212 (Mich. 1975)
People v. Alford, 251 N.W.2d 314 (Mich. Ct. App. 1977), *aff'd*, 274 N.W.2d 484 (Mich. 1979)
State v. Bridges, 398 S.W.2d 1 (Mo. 1966)
State v. Vaccaro, 361 A.2d 47 (N.J. Super. Ct. App. Div.), *cert. denied*, 366 A.2d 674 (N.J. 1976)

State v. Carr, 626 P.2d 292 (N.M. Ct. App.), *cert. denied*, 625 P.2d 1186 (N.M.), *cert. denied*, 454 U.S. 853 (1981)
People v. Greenwood, 139 N.Y.S.2d 654 (County Ct.), *aff'd*, 132 N.E.2d 308 (1955)
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State v. McCarthy, 605 N.E.2d 911 (Ohio 1992)
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Commonwealth v. West, 396 A.2d 380 (Pa. Super. Ct. 1978)
Commonwealth v. Shelhorse, 381 A.2d 1305 (Pa. Super. Ct. 1977)
State v. Lawrence, 212 S.E.2d 52 (S.C. 1974), *cert. denied*, 422 U.S. 1025 (1975)
McLean v. State, 527 S.W.2d 76 (Tenn. 1975)
Haney v. State, 544 S.W.2d 384 (Tex. Crim. App. 1976)
DeVine v. State, 206 S.W.2d 247 (Tex. Crim. App. 1947)
State v. Welch, 624 A.2d 1105 (Vt. 1992)
State v. Gilmore, 456 P.2d 344 (Wash. 1969)
State v. Young, 406 S.E.2d 758 (W. Va. 1991)

II. Cases Prosecuted for Services Not Performed

United States v. Siddiqi, 959 F.2d 1167 (2d Cir. 1992)
United States v. Casey, 951 F.2d 892 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 2284 (1992)
United States v. Lennartz, 948 F.2d 363 (7th Cir. 1991)
United States v. Nazon, 940 F.2d 255 (7th Cir. 1991)
United States v. Hooshmand, 931 F.2d 725 (11th Cir. 1991)
United States v. Kline, 922 F.2d 610 (10th Cir. 1990)
United States v. Campbell, 845 F.2d 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988)
United States v. Larm, 824 F.2d 780 (9th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988)
United States v. Lamport, 787 F.2d 474 (10th Cir.), *cert. denied*, 479 U.S. 846 (1986)
United States v. Hilliard, 752 F.2d 578 (11th Cir. 1985)
United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)
United States v. Varoz, 740 F.2d 772 (10th Cir. 1984)
Worthington v. United States, 726 F.2d 1089 (6th Cir.), *cert. denied*, 469 U.S. 827 (1984)
United States v. Abadi, 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)
United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)
United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982)
United States v. Sherer, 653 F.2d 334 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981)

- United States v. Johnson, 634 F.2d 735 (4th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)
- United States v. Adler, 623 F.2d 1287 (8th Cir. 1980)
- United States v. Abrams, 615 F.2d 541 (1st Cir. 1980)
- United States v. Zipstein, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980)
- United States v. Halper, 590 F.2d 422 (2d Cir. 1978)
- United States v. Jones, 587 F.2d 802 (5th Cir. 1979)
- United States v. Herberman, 583 F.2d 222 (5th Cir. 1978)
- United States v. Evans, 559 F.2d 244 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015, *and cert. denied*, 435 U.S. 945 (1978)
- United States v. Berdick, 555 F.2d 1329 (5th Cir.), *cert. denied*, 434 U.S. 1010 (1977)
- United States v. Beasley, 550 F.2d 261 (5th Cir.), *cert. denied*, 434 U.S. 938 (1977)
- United States v. Gordon, 548 F.2d 743 (8th Cir. 1977)
- United States v. Radetsky, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 994 (10th Cir. 1990)
- United States v. Holt, 529 F.2d 981 (4th Cir. 1975)
- United States v. Cacioppo, 517 F.2d 22 (8th Cir. 1975)
- United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975)
- United States v. Catena, 500 F.2d 1319 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974)
- United States v. Matanky, 482 F.2d 1319 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973)
- United States v. Blazewicz, 459 F.2d 442 (6th Cir. 1972)
- United States v. Katz, 455 F.2d 496 (5th Cir.), *cert. denied*, 408 U.S. 923 (1972)
- United States v. Chakmakis, 449 F.2d 315 (5th Cir. 1971)
- Hughes v. United States, 231 F. 50 (5th Cir.), *cert. denied*, 242 U.S. 640 (1916)
- United States v. Colletta, 602 F. Supp. 1322 (E.D. Pa.), *aff'd*, 770 F.2d 1076 (3d Cir. 1985)
- United States v. Mitlo, 557 F. Supp. 520 (W.D. Pa.), *rev'd*, 714 F.2d 294 (3d Cir.), *cert. denied*, 464 U.S. 1018 (1983)
- United States v. Wilson, 490 F. Supp. 713 (E.D. Mich. 1980), *aff'd*, 639 F.2d 314 (6th Cir. 1981)
- People v. Thayer, 408 P.2d 108 (Cal. 1965), *cert. denied*, 384 U.S. 908 (1966)
- People v. Blasquez, 211 Cal. Rptr. 335 (Ct. App. 1985)
- People v. Cobbs, 126 Cal. Rptr. 494 (Ct. App. 1975)
- People v. Slocum, 125 Cal. Rptr. 442 (Ct. App. 1975), *cert. denied*, 426 U.S. 924 (1976)
- People v. Berke, 603 N.E.2d 737 (Ill. App. Ct. 1992)
- People v. Einstein, 435 N.E.2d 1257 (Ill. App. Ct. 1982)
- State v. Barrilleaux, 620 So. 2d 1317 (La. 1993)

- State v. Cargille, 507 So. 2d 1254 (La. Ct. App. 1987)
People v. Freedland, 444 N.W.2d 250 (Mich. Ct. App. 1989), *cert. denied*, 498 U.S. 853 (1990)
People v. American Medical Ctrs., Ltd., 324 N.W.2d 782 (Mich. Ct. App.), *cert. denied*, 464 U.S. 1009 (1983)
State v. Fellman, 193 N.W.2d 775 (Neb. 1972)
People v. Weinberg, 586 N.Y.S.2d 132 (App. Div.), *appeal denied*, 605 N.E.2d 883 (N.Y. 1992)
People v. Chaitin, 462 N.Y.S.2d 61 (App. Div. 1983), *aff'd*, 460 N.E.2d 1082 (N.Y. 1984)
People v. Alizadeh, 452 N.Y.S.2d 425 (App. Div. 1982)
People v. Montesano, 446 N.Y.S.2d 813 (App. Div. 1982)
State v. Beatty, 308 S.E.2d 65 (N.C. Ct. App.), *appeal denied*, 310 S.E.2d 354 (N.C. 1983)
State v. Page, 232 S.E.2d 460 (N.C. Ct. App.), *appeal denied*, 235 S.E.2d 64 (N.C. 1977)
Commonwealth v. Wu, 494 A.2d 7 (Pa. Super. Ct. 1985)
Commonwealth v. Askin, 452 A.2d 851 (Pa. Super. Ct. 1982), *modified*, 467 A.2d 820 (Pa. 1983)
State v. Carr, 861 S.W.2d 850 (Tenn. Crim. App. 1993)
State v. Chenette, 560 A.2d 365 (Vt. 1989)
State v. Mark, 618 P.2d 73 (Wash. 1980)
State v. Marshall, 606 P.2d 278 (Wash. Ct. App. 1980)
State v. Kennedy, 314 N.W.2d 884 (Wis. Ct. App. 1981)
State v. Dean, 314 N.W.2d 151 (Wis. Ct. App. 1981)

III. Cases Prosecuted for Misrepresenting the Nature of Services Provided

- United States v. Lennartz, 948 F.2d 363 (7th Cir. 1991)
United States v. Weiss, 914 F.2d 1514 (2d Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991)
United States v. Marrero, 904 F.2d 251 (5th Cir.), *cert. denied*, 498 U.S. 1000 (1990)
United States v. Cegelka, 853 F.2d 627 (8th Cir.), *cert. denied*, 488 U.S. 1011 (1988)
United States v. Brown, 763 F.2d 984 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985)
United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)
United States v. Huckaby, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983)
United States v. Edgewood Health Care Ctr., Inc., 608 F.2d 13 (1st Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980)
United States v. Precision Medical Lab., Inc., 593 F.2d 434 (2d Cir. 1978)
United States v. Rousseau, 534 F.2d 584 (5th Cir. 1976)

- United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975)
United States v. Peterson, 488 F.2d 645 (5th Cir. 1974)
United States v. Russo, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974)
Ex parte Hunte, 436 So. 2d 806 (Ala. 1983)
State v. MacGillivray, 785 P.2d 59 (Ariz. Ct. App. 1989)
State v. Barber, 388 S.E.2d 350 (Ga. Ct. App. 1989), *writ vacated*, 394 S.E.2d 353 (Ga. 1990)
State v. Sword, 713 P.2d 432 (Haw. 1986)
State v. Griffon, 448 So. 2d 1287 (La. 1984)
State v. Hughes, 433 So. 2d 88 (La. 1983)
State v. McDermitt, 406 So. 2d 195 (La. 1981)
State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *rev'd in part, aff'd in part*, 574 So. 2d 330 (La. 1990)
State v. Heath, 513 So. 2d 493 (La. Ct. App. 1987), *writ denied*, 519 So. 2d 141 (La. 1988)
United States v. Hughes, 895 F.2d 1135 (6th Cir. 1990)
People v. Bovee, 285 N.W.2d 53 (Mich. Ct. App. 1979)
Sherriff v. Spagnola, 706 P.2d 840 (Nev. 1985)
State v. Hermsdorf, 605 A.2d 1045 (N.H. 1992)
State v. Greco, 148 A.2d 164 (N.J. 1959)
People v. Perry, 605 N.Y.S.2d 790 (App. Div. 1993)
People v. Asar, 523 N.Y.S.2d 910 (App. Div. 1988)
People v. Kendzia, 478 N.Y.S.2d 209 (App. Div. 1984)
People v. Weinfeld, 410 N.Y.S.2d 472 (App. Div. 1978)
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Commonwealth v. Nesbit, 575 A.2d 633 (Pa. Super. Ct. 1990), *cert. denied*, 500 U.S. 927 (1991)
Commonwealth v. Stein, 546 A.2d 36 (Pa. Super. Ct. 1987), *cert. denied*, 490 U.S. 1046 (1989)
State v. Venman, 564 A.2d 574 (Vt. 1989)
State v. Dorn, 496 A.2d 451 (Vt. 1985)
State v. Quinn, 719 P.2d 936 (Wash. Ct. App. 1986)
State v. DeSmidt, 454 N.W.2d 780 (Wis. 1990)
State v. Dean, 314 N.W.2d 151 (Wis. Ct. App. 1981)

IV. Cases Prosecuted as Accident Scams

- United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1660 (1994)
United States v. Neely, 980 F.2d 1074 (7th Cir. 1992)

- United States v. Duncan, 919 F.2d 981 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991)
- United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987), *cert. denied*, 485 U.S. 907 (1988)
- United States v. Krowen, 809 F.2d 144 (1st Cir. 1986)
- United States v. Jackson, 761 F.2d 1541 (11th Cir. 1985)
- United States v. Warren, 747 F.2d 1339 (10th Cir. 1984)
- United States v. Gamble, 737 F.2d 853 (10th Cir. 1984)
- United States v. Strong, 702 F.2d 97 (6th Cir. 1983)
- United States v. Nichols, 695 F.2d 86 (5th Cir. 1982)
- United States v. Drury, 687 F.2d 63 (5th Cir. 1982), *cert. denied*, 461 U.S. 943 (1983)
- United States v. Tager, 638 F.2d 167 (10th Cir. 1980)
- United States v. Witschner, 624 F.2d 840 (8th Cir.), *cert. denied*, 449 U.S. 994 (1980)
- United States v. Zicree, 605 F.2d 1381 (5th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980)
- United States v. Reamer, 589 F.2d 769 (4th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979)
- United States v. Del Valle, 587 F.2d 699 (5th Cir.), *cert. denied*, 442 U.S. 909 (1979)
- United States v. Boscia, 573 F.2d 827 (3d Cir.), *cert. denied*, 436 U.S. 911, *and cert. denied*, 439 U.S. 854 (1978)
- United States v. Cady, 567 F.2d 771 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978)
- United States v. Perkal, 530 F.2d 604 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976)
- United States v. Britton, 500 F.2d 1257 (8th Cir. 1974)
- United States v. Reicin, 497 F.2d 563 (7th Cir.), *cert. denied*, 419 U.S. 996 (1974)
- United States v. Silvern, 494 F.2d 355 (7th Cir. 1973)
- United States v. Perez, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974)
- United States v. Parkman, 488 F.2d 1392 (5th Cir. 1973), *cert. denied*, 416 U.S. 983 (1974)
- United States v. Medansky, 486 F.2d 807 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974)
- United States v. Kaplan, 470 F.2d 100 (7th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973)
- United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972)
- United States v. Shuford, 454 F.2d 772 (4th Cir. 1971)
- United States v. Sternback, 402 F.2d 353 (7th Cir. 1968), *cert. denied*, 393 U.S. 1082 (1969)
- Everitt v. United States, 306 F.2d 839 (5th Cir. 1962), *cert. denied*, 372 U.S. 920 (1963)

United States v. Lebovitz, 586 F. Supp. 265 (W.D. Pa.), *aff'd*, 746 F.2d 1468 (3d Cir. 1984)
People v. Scofield, 95 Cal. Rptr. 405 (Ct. App. 1971)
People v. Benson, 23 Cal. Rptr. 908 (Ct. App. 1962), *cert. denied*, 374 U.S. 806 (1963), *overruled by* People v. Perez, 401 P.2d 934 (Cal. 1965)
Glassman v. State, 377 So. 2d 208 (Fla. Dist. Ct. App. 1979)
People v. Kayne, 255 N.W. 758 (Mich. 1934)
State v. Olkon, 299 N.W.2d 89 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981)
State v. Poganski, 257 N.W.2d 578 (Minn. 1977)
State v. Toscano, 378 A.2d 755 (N.J. 1977)

V. Cases Prosecuted for Quackery

United States v. Keller, 784 F.2d 1296 (5th Cir. 1986)
United States v. Maturo, 536 F.2d 427 (D.C. Cir. 1976)
United States v. Vecchiarello, 536 F.2d 420 (D.C. Cir. 1976)
United States v. Taller, 394 F.2d 435 (2d Cir.), *cert. denied*, 393 U.S. 839 (1968)
United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967)
United States v. DeWelles, 345 F.2d 387 (7th Cir.), *cert. denied*, 382 U.S. 833 (1965)
United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948)
Baker v. United States, 115 F.2d 533 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941)
United States v. Lee, 107 F.2d 522 (7th Cir. 1939), *cert. denied*, 309 U.S. 659 (1940)
Barnhill v. United States, 96 F.2d 116 (10th Cir. 1938)
West v. United States, 68 F.2d 96 (10th Cir. 1933)
Stunz v. United States, 27 F.2d 575 (8th Cir. 1928)
Kar-Ru Chem. Co. v. United States, 264 F. 921 (9th Cir. 1920)
Hughes v. United States, 231 F. 50 (5th Cir.), *cert. denied*, 242 U.S. 640 (1916)
Moses v. United States, 221 F. 863 (2d Cir.), *cert. denied*, 238 U.S. 629 (1915)
Bruce v. United States, 202 F. 98 (8th Cir. 1912)
Dyar v. United States, 186 F. 614 (5th Cir. 1911)
Hibbard v. United States, 172 F. 66 (7th Cir. 1909)
United States v. Sugar, 606 F. Supp. 1134 (S.D.N.Y. 1985)
People v. Burroughs, 678 P.2d 894 (Cal. 1984)
People v. Marsh, 376 P.2d 300 (Cal. 1962)
People v. Brych, 250 Cal. Rptr. 402 (Ct. App. 1988)
United States v. Privitera, 141 Cal. Rptr. 764 (Ct. App. 1977), *vacated*, 591 P.2d 919 (Cal.), *cert. denied*, 444 U.S. 949 (1979)
People v. Eckley, 108 Cal. Rptr. 52 (Ct. App. 1973)

People v. Chatfield, 77 Cal. Rptr. 118 (Ct. App. 1969), *cert. denied*, 402 U.S. 951 (1971)
People v. Chapman, 24 Cal. Rptr. 568 (Ct. App. 1962)
People v. Bowman, 320 P.2d 70 (Cal. Dist. Ct. App. 1958)
People v. Schmitt, 317 P.2d 673 (Cal. Dist. Ct. App. 1957)
People v. Schroeder, 281 P.2d 297 (Cal. Dist. Ct. App. 1955)
People v. Gelb, 565 N.E.2d 474 (N.Y. 1990)
People v. Varas, 487 N.Y.S.2d 577 (App. Div. 1985)
Commonwealth v. Johnson, 167 A. 344 (Pa. 1933)
Sorce v. State, 736 S.W.2d 851 (Tex. Crim. App. 1987)
State v. Hoffman, 558 P.2d 602 (Utah 1976)

VI. Cases Prosecuted for Taking Kickbacks

United States v. Levin, 973 F.2d 463 (6th Cir. 1992)
United States v. Bay State Ambulance & Hosp. Rental Serv., 874 F.2d 20 (1st Cir. 1989)
United States v. Kats, 871 F.2d 105 (9th Cir. 1989)
United States v. Lipkis, 770 F.2d 1447 (9th Cir. 1985)
United States v. Greber, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 998 (1985)
United States v. Universal Trade & Indus., Inc., 695 F.2d 1151 (9th Cir. 1983)
United States v. Stewart Clinical Lab., Inc., 652 F.2d 804 (9th Cir. 1981)
United States v. Duz-Mor, 650 F.2d 223 (9th Cir. 1981)
United States v. Perlstein, 632 F.2d 661 (6th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981)
United States v. Ruttenberg, 625 F.2d 173 (7th Cir. 1980)
United States v. Hancock, 604 F.2d 999 (7th Cir.), *cert. denied*, 444 U.S. 991 (1979)
United States v. Porter, 591 F.2d 1048 (5th Cir. 1979)
United States v. Winkle, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)
United States v. Zacher, 586 F.2d 912 (2d Cir. 1978)
United States v. Hughes, 823 F. Supp. 593 (N.D. Ind. 1993)
United States v. Sadlier, 649 F. Supp. 1560 (D. Mass. 1986)
United States v. Weingarden, 468 F. Supp. 410 (E.D. Mich. 1979), *aff'd sub nom. United States v. Tapert* 625 F.2d 111 (6th Cir.), *cert. denied*, 449 U.S. 952, and *cert. denied*, 449 U.S. 1034 (1980)
People v. Bynum, 557 N.E.2d 238 (Ill. App. Ct. 1990)
State v. Burnett, 556 A.2d 1251 (N.J. Super. Ct. App. Div. 1989)
People v. Warden, 529 N.Y.S.2d 230 (App. Div. 1988)
People v. Forhman, 443 N.Y.S.2d 881 (App. Div. 1981)
People v. Lieberman, 405 N.Y.S.2d 559 (Sup. Ct. 1978)

VII. Cases Prosecuted for False Cost Reports

- United States v. Morris, 957 F.2d 1391 (7th Cir.), *cert. denied*, 113 S. Ct. 380 (1992)
- United States v. Alemany Rivera, 781 F.2d 229 (1st Cir. 1985), *cert. denied*, 475 U.S. 1086 (1986)
- United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980)
- United States v. Collins, 596 F.2d 166 (6th Cir. 1979)
- United States v. Jones, 587 F.2d 802 (5th Cir. 1979)
- United States v. Cella, 568 F.2d 1266 (9th Cir. 1977)
- United States v. Nemes, 555 F.2d 51 (2d Cir. 1977)
- United States v. Smith, 523 F.2d 771 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976)
- United States v. Simon, 510 F. Supp. 232 (E.D. Pa. 1981)
- United States v. Braunstein, 474 F. Supp. 1 (D.N.J. 1979)
- McKennie v. State, 439 So. 2d 706 (Ala. Crim. App. 1982), *rev'd*, 439 So. 2d 713 (Ala. 1983)
- Frye v. State, 369 So. 2d 892 (Ala. Crim. App. 1979)
- Greco v. State, 515 A.2d 220 (Md. 1986)
- Commonwealth v. Cerveny, 367 N.E.2d 802 (Mass. 1977), *overruled by* Commonwealth v. Crocker, 424 N.E.2d 524 (Mass. 1981)
- Commonwealth v. Minkin, 436 N.E.2d 955 (Mass. App. Ct.), *review denied*, 438 N.E.2d 75 (Mass. 1982)
- State v. Ruud, 259 N.W.2d 567 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978)
- State v. Hoffman, 412 A.2d 120 (N.J. 1980)
- State v. Loughrey, 373 A.2d 703 (N.J. Super. Ct. App. Div. 1977)
- People v. Notey, 423 N.Y.S.2d 947 (App. Div. 1980)
- People v. Severino, 406 N.Y.S.2d 105 (App. Div. 1978)
- People v. Wolf, 397 N.Y.S.2d 131 (App. Div. 1977)
- People v. Christiano, 386 N.Y.S.2d 620 (County Ct. 1976)

VIII. Cases Prosecuted for Unnecessary Services Provided

- United States v. Hughes, 895 F.2d 1135 (6th Cir. 1990)
- United States v. Goldberg, 862 F.2d 101 (6th Cir. 1988)
- United States v. Campbell, 845 F.2d 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988)
- United States v. Sblendorio, 830 F.2d 1362 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988)
- United States v. Azad, 809 F.2d 291 (6th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987)
- United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)
- United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)
- United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)

- United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 44 U.S. 1031 (1980)
- United States v. Halper, 590 F.2d 422 (2d Cir. 1978)
- Hughes v. United States, 231 F. 50 (5th Cir.), *cert. denied*, 242 U.S. 640 (1916)
- United States v. Furman, 507 F. Supp. 848 (D. Md. 1981), *rev'd*, 672 F.2d 914 (4th Cir. 1981)
- United States v. Talbott, 460 F. Supp. 253 (S.D. Ohio), *aff'd*, 590 F.2d 192 (6th Cir. 1978)
- United States v. Smith, 222 F. 165 (E.D. Pa. 1915)
- People v. Rehman, 61 Cal. Rptr. 65 (Ct. App. 1967), *cert. denied*, 390 U.S. 947 (1968)
- People v. Bowman, 320 P.2d 70 (Cal. Dist. Ct. App. 1958)
- People v. Freedland, 444 N.W.2d 250 (Mich. Ct. App. 1989), *cert. denied*, 498 U.S. 853 (1990)
- In re Wayne County Prosecutor*, 329 N.W.2d 510 (Mich. Ct. App. 1982)

APPENDIX II

CHRONOLOGICAL DISTRIBUTION OF PROSECUTIONS OF HEALTH
CARE PROVIDERS⁵⁷⁵

I. Cases Prosecuted in the 1900s

Hibbard v. United States, 172 F. 66 (7th Cir. 1909)

II. Cases Prosecuted in the 1910s

Dyar v. United States, 186 F. 614 (5th Cir. 1911)

Bruce v. United States, 202 F. 98 (8th Cir. 1912)

United States v. Smith, 222 F. 165 (E.D. Pa. 1915)

Moses v. United States, 221 F. 863 (2d Cir.), *cert. denied*, 238 U.S. 629 (1915)

Hughes v. United States, 231 F. 50 (5th Cir.), *cert. denied*, 242 U.S. 640 (1916)

Thurston v. United States, 241 F. 335 (5th Cir.), *cert. denied*, 245 U.S. 646 (1917)

United States v. Fleming, 251 F. 932 (W.D. Pa. 1918)

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Webb v. United States, 249 U.S. 96 (1919)

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Thompson v. United States, 258 F. 196 (8th Cir.), *cert. denied*, 251 U.S. 553 (1919)

III. Cases Prosecuted in the 1920s

Rothman v. United States, 270 F. 31 (2d Cir.), *cert. denied*, 254 U.S. 652 (1920)

Moy v. United States, 254 U.S. 189 (1920), *overruled by* Funk v. United States, 290 U.S. 371 (1933)

Kar-Ru Chem. Co. v. United States, 264 F. 921 (9th Cir. 1920)

Oliver v. United States, 267 F. 544 (4th Cir. 1920)

Hoyt v. United States, 273 F. 792 (2d Cir. 1921)

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Barbot v. United States, 273 F. 919 (4th Cir. 1921)

United States v. Behrman, 258 U.S. 280 (1922)

Manning v. United States, 287 F. 800 (8th Cir. 1923)

Aiton v. United States, 3 F.2d 992 (9th Cir. 1925)

Linder v. United States, 268 U.S. 5 (1925)

Boyd v. United States, 271 U.S. 104 (1926)

Bush v. United States, 16 F.2d 709 (5th Cir. 1927)

Stunz v. United States, 27 F.2d 575 (8th Cir. 1928)

575. All case names are listed in ascending chronological order.

Manning v. United States, 31 F.2d 911 (8th Cir. 1929)

IV. Cases Prosecuted in the 1930s

Commonwealth v. Johnson, 167 A. 344 (Pa. 1933)

West v. United States, 68 F.2d 96 (10th Cir. 1933)

People v. Kayne, 255 N.W. 758 (Mich. 1934)

Strader v. United States, 72 F.2d 589 (10th Cir. 1934)

MacLafferty v. United States, 77 F.2d 715 (9th Cir. 1935)

People v. Guaglita, 200 N.E. 169 (Ill.), *cert. denied*, 298 U.S. 667 (1936)

DuVall v. United States, 82 F.2d 382 (9th Cir.), *cert. denied*, 298 U.S. 667 (1936)

United States v. Anthony, 15 F. Supp. 553 (S.D. Cal. 1936)

Towbin v. United States, 93 F.2d 861 (10th Cir. 1938)

Smith v. State, 13 N.E.2d 562 (Ind. 1938)

Barnhill v. United States, 96 F.2d 116 (10th Cir. 1938)

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Heller v. United States, 104 F.2d 446 (4th Cir. 1939)

United States v. Lee, 107 F.2d 522 (7th Cir. 1939), *cert. denied*, 309 U.S. 659 (1940)

V. Cases Prosecuted in the 1940s

Baker v. United States, 115 F.2d 533 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941)

Nigro v. United States, 117 F.2d 624 (8th Cir. 1941)

Direct Sales Co. v. United States, 319 U.S. 703 (1943)

United States v. Lindenfeld, 142 F.2d 829 (2d Cir.), *cert. denied*, 323 U.S. 761 (1944)

Mitchell v. United States, 143 F.2d 953 (10th Cir. 1944)

United States v. Abdallah, 149 F.2d 219 (2d Cir.), *cert. denied*, 326 U.S. 724 (1945)

United States v. Brandenburg, 155 F.2d 110 (3d Cir. 1946)

United States v. Tommasello, 160 F.2d 348 (2d Cir. 1947)

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VI. Cases Prosecuted in the 1950s

People v. Braddock, 264 P.2d 521 (Cal. 1953), *cert. denied*, 348 U.S. 837 (1954)

People v. Greenwood, 139 N.Y.S.2d 654 (County Ct.), *aff'd*, 132 N.E.2d 308 (N.Y. 1955)

People v. Schroeder, 281 P.2d 297 (Cal. Dist. Ct. App. 1955)

McBride v. United States, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956)

Neill v. United States, 225 F.2d 174 (8th Cir. 1955)

People v. Nunn, 296 P.2d 813 (Cal.), *cert. denied*, 352 U.S. 833 (1956)
People v. Schmitt, 317 P.2d 673 (Cal. Dist. Ct. App. 1957)
Brown v. United States, 250 F.2d 745 (5th Cir.), *cert. denied*, 356 U.S. 938 (1958)
People v. Bowman, 320 P.2d 70 (Cal. Dist. Ct. App. 1958)
Commonwealth v. Litman, 144 A.2d 592 (Pa. 1958)
State v. Greco, 148 A.2d 164 (N.J. 1959)

VII. Cases Prosecuted in the 1960s

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People v. Rossi, 230 N.Y.S.2d 7 (App. Div. 1962)
Everitt v. United States, 306 F.2d 839 (5th Cir. 1962), *cert. denied*, 372 U.S. 920 (1963)
People v. Benson, 23 Cal. Rptr. 908 (Ct. App. 1962), *cert. denied*, 374 U.S. 806 (1963), *overruled by* People v. Perez, 401 P.2d 934 (Cal. 1965)
People v. Chapman, 24 Cal. Rptr. 568 (Ct. App. 1962)
People v. Marsh, 376 P.2d 300 (Cal. 1962)
People v. Meyer, 31 Cal. Rptr. 285 (Ct. App. 1963)
United States v. DeWelles, 345 F.2d 387 (7th Cir.), *cert. denied*, 382 U.S. 833 (1965)
People v. Thayer, 47 Cal. Rptr. 780 (1965), *cert. denied*, 384 U.S. 908 (1966)
State v. Bridges, 398 S.W.2d 1 (Mo. 1966)
United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied* 385 U.S. 1001 (1967)
People v. Rehman, 61 Cal. Rptr. 65 (Ct. App. 1967), *cert. denied*, 390 U.S. 947 (1968)
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United States v. Taller, 394 F.2d 435 (2d Cir.), *cert. denied*, 393 U.S. 839 (1968)
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United States v. Sternback, 402 F.2d 353 (7th Cir. 1968), *cert. denied*, 393 U.S. 1082 (1969)
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People v. Chatfield, 77 Cal. Rptr. 118 (Ct. App. 1969), *cert. denied*, 402 U.S. 951 (1971)

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People v. Scofield, 95 Cal. Rptr. 405 (Ct. App. 1971)
United States v. Chakmakis, 449 F.2d 315 (5th Cir. 1971)
United States v. Shuford, 454 F.2d 772 (4th Cir. 1971)
United States v. Warren, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972)
State v. Fellman, 193 N.W.2d 775 (Neb. 1972)

- United States v. Katz, 455 F.2d 496 (5th Cir.), *cert. denied*, 408 U.S. 923 (1972)
- United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972)
- United States v. Blazewicz, 459 F.2d 442 (6th Cir. 1972)
- United States v. Kraude, 467 F.2d 37 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1972)
- United States v. Kaplan, 470 F.2d 100 (7th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973)
- State v. Jacobs, 503 P.2d 826 (Ariz. Ct. App. 1972)
- United States v. Silvern, 494 F.2d 355 (7th Cir. 1973)
- United States v. Leigh, 487 F.2d 206 (5th Cir. 1973))
- United States v. Carey, 475 F.2d 1019 (9th Cir. 1973)
- United States v. Collier, 478 F.2d 268 (5th Cir. 1973)
- United States v. Bartee, 479 F.2d 484 (10th Cir. 1973)
- People v. Eckley, 108 Cal. Rptr. 52 (Ct. App. 1973)
- People v. Kurland, 117 Cal. Rptr. 216 (Ct. App. 1973)
- United States v. Matanky, 482 F.2d 1319 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973)
- United States v. Russo, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974)
- United States v. Medansky, 486 F.2d 807 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974)
- United States v. Perez, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974)
- United States v. Jobe, 487 F.2d 268 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974)
- United States v. Parkman, 488 F.2d 1392 (5th Cir. 1973), *cert. denied*, 416 U.S. 983 (1974)
- United States v. Badia, 490 F.2d 296 (1st Cir. 1973)
- United States v. Peterson, 488 F.2d 645 (5th Cir. 1974)
- United States v. Larson, 507 F.2d 385 (9th Cir. 1974)
- United States v. Reicin, 497 F.2d 563 (7th Cir.), *cert. denied*, 419 U.S. 996 (1974)
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- United States v. Catena, 500 F.2d 1319 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974)
- United States v. Britton, 500 F.2d 1257 (8th Cir. 1974)
- State v. Lawrence, 212 S.E.2d 52 (S.C. 1974), *cert. denied*, 422 U.S. 1025 (1975)
- United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975)
- United States v. Green, 511 F.2d 1062 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
- People v. Downes, 228 N.W.2d 212 (Mich. 1975)
- United States v. Black, 512 F.2d 864 (9th Cir. 1975)
- United States v. Cacioppo, 517 F.2d 22 (8th Cir. 1975)

- United States v. Rosenberg, 515 F.2d 190 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
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- McLean v. State, 527 S.W.2d 76 (Tenn. 1975)
- People v. Slocum, 125 Cal. Rptr. 442 (Ct. App. 1975), *cert. denied*, 426 U.S. 924 (1976)
- United States v. Smith, 523 F.2d 771 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976)
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- United States v. Moore, 423 U.S. 122 (1975)
- United States v. Holt, 529 F.2d 981 (4th Cir. 1975)
- United States v. Ellzey, 527 F.2d 1306 (6th Cir. 1976)
- United States v. Perkal, 530 F.2d 604 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976)
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- State v. Vaccaro, 361 A.2d 47 (N.J. Super. Ct. App. Div.), *cert. denied*, 366 A.2d 674 (N.J. 1976)
- United States v. Maturo, 536 F.2d 427 (D.C. Cir. 1976)
- United States v. Vecchiarello, 536 F.2d 420 (D.C. Cir. 1976)
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- Haney v. State, 544 S.W.2d 384 (Tex. Crim. App. 1976)
- People v. Christiano, 386 N.Y.S.2d 620 (County Ct. 1976)
- People v. Brown, 132 Cal. Rptr. 217 (Ct. App. 1976)
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- People v. Alford, 251 N.W.2d 314 (Mich. Ct. App. 1977), *aff'd*, 275 N.W.2d 484 (Mich. 1979)
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- United States v. Nemes, 555 F.2d 51 (2d Cir. 1977)
- United States v. Pastor, 557 F.2d 930 (2d Cir. 1977)
- United States v. Beasley, 550 F.2d 261 (5th Cir.), *cert. denied*, 434 U.S. 938 (1977)
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- United States v. Cella, 568 F.2d 1266 (9th Cir. 1977)
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- United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977)
- United States v. Evans, 559 F.2d 244 (5th Cir.), *cert. denied*, 434 U.S. 1015, *and cert denied*, 435 U.S. 945 (1977)
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- United States v. Privitera, 141 Cal. Rptr. 764 (Ct. App. 1977), *vacated*, 591 P.2d 919 (Cal.), *cert. denied*, 444 U.S. 949 (1979)
- United States v. Talbott, 460 F. Supp. 253 (S.D. Ohio), *aff'd*, 590 F.2d 192 (6th Cir. 1978)
- United States v. Boscia, 573 F.2d 827 (3d Cir.), *cert. denied*, 436 U.S. 911, *and cert. denied*, 439 U.S. 854 (1978)
- United States v. Roya, 574 F.2d 386 (7th Cir.), *cert. denied*, 439 U.S. 1048 (1978)
- United States v. Schiffman, 572 F.2d 1137 (5th Cir. 1978)
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- United States v. Braunstein, 474 F. Supp. 1 (D.N.J. 1978)
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- United States v. Herberman, 583 F.2d 222 (5th Cir. 1978)
- United States v. Halper, 590 F.2d 422 (2d Cir. 1978)
- United States v. Precision Medical Lab., Inc., 593 F.2d 434 (2d Cir. 1978)
- United States v. Reamer, 589 F.2d 769 (4th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979)
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- United States v. Hill, 589 F.2d 1344 (8th Cir.), *cert. denied*, 442 U.S. 919 (1979)
- United States v. Del Valle, 587 F.2d 699 (5th Cir.), *cert. denied*, 442 U.S. 909 (1979)
- United States v. Winkle, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)
- United States v. Jones, 587 F.2d 802 (5th Cir. 1979)
- United States v. Smurthwaite, 590 F.2d 889 (10th Cir. 1979)
- United States v. Porter, 591 F.2d 1048 (5th Cir. 1979)
- United States v. Collins, 596 F.2d 166 (6th Cir. 1979)
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- United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980)
- United States v. Hancock, 604 F.2d 999 (7th Cir.), *cert. denied*, 444 U.S. 991 (1979)
- United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980)
- United States v. Schaffer, 600 F.2d 1120 (5th Cir. 1979)
- People v. Bovee, 285 N.W.2d 53 (Mich. Ct. App. 1979)
- United States v. Edgewood Health Care Ctr., Inc., 608 F.2d 13 (1st Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980)
- United States v. Zicree, 605 F.2d 1381 (5th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980)
- Glassman v. State, 377 So. 2d 208 (Fla. Dist. Ct. App. 1979)

IX. Cases Prosecuted in the 1980s

- United States v. Wilson, 490 F. Supp. 713 (E.D. Mich. 1980), *aff'd*, 639 F.2d 314 (6th Cir. 1981)
- United States v. Rogers, 609 F.2d 834 (5th Cir. 1980)
- People v. Notey, 423 N.Y.S.2d 947 (App. Div. 1980)
- United States v. Abrams, 615 F.2d 541 (1st Cir. 1980)
- State v. Marshall, 606 P.2d 278 (Wash. Ct. App. 1980)
- State v. Hoffman, 412 A.2d 120 (N.J. 1980)
- United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980)
- United States v. Tapert, 625 F.2d 111 (6th Cir.), *cert. denied*, 449 U.S. 952 (1980)
- United States v. Adler, 623 F.2d 1287 (8th Cir. 1980)
- United States v. Witschner, 624 F.2d 840 (8th Cir.), *cert. denied*, 449 U.S. 994 (1980)
- United States v. Ruttenberg, 625 F.2d 173 (7th Cir. 1980)
- State v. Karwacki, 616 P.2d 226 (Haw. Ct. App. 1980)
- State v. Olkon, 299 N.W.2d 89 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981)
- United States v. Perlstein, 632 F.2d 661 (6th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981)
- State v. Mark, 618 P.2d 73 (Wash. 1980)
- United States v. Tager, 638 F.2d 167 (10th Cir. 1980)
- United States v. Johnson, 634 F.2d 735 (4th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)
- United States v. Furman, 507 F. Supp. 848 (D. Md.), *rev'd*, 672 F.2d 914 (4th Cir. 1981)
- State v. Carr, 626 P.2d 292 (N.M. Ct. App.), *cert. denied*, 625 P.2d 1186 (N.M.), *cert. denied*, 454 U.S. 853 (1981)
- United States v. Simon, 510 F. Supp. 232 (E.D. Pa. 1981)
- United States v. Goldstein, 695 F.2d 1228 (10th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983)

- United States v. Stewart Clinical Lab., Inc., 652 F.2d 804 (9th Cir. 1981)
- United States v. Sherer, 653 F.2d 334 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981)
- United States v. Duz-Mor, 650 F.2d 223 (9th Cir. 1981)
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- State v. Dean, 314 N.W.2d 151 (Wis. Ct. App. 1981)
- People v. Forhman, 443 N.Y.S.2d 881 (App. Div. 1981)
- State v. McDermitt, 406 So. 2d 195 (La. 1981)
- State v. Kennedy, 314 N.W.2d 884 (Wis. Ct. App. 1981)
- People v. Montesano, 446 N.Y.S.2d 813 (App. Div. 1982)
- People v. Einstein, 435 N.E.2d 1257 (Ill. App. Ct. 1982)
- Commonwealth v. Minkin, 436 N.E.2d 955 (Mass. App. Ct.), *review denied*, 438 N.E.2d 75 (Mass. 1982)
- United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982)
- People v. Alizadeh, 452 N.Y.S.2d 425 (App. Div. 1982)
- United States v. Leichtling, 684 F.2d 553 (8th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983)
- United States v. Dumas, 688 F.2d 84 (10th Cir. 1982)
- United States v. Drury, 687 F.2d 63 (5th Cir. 1982), *cert. denied*, 461 U.S. 943 (1983)
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- United States v. Huckaby, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983)
- United States v. Nichols, 695 F.2d 86 (5th Cir. 1982)
- People v. American Medical Ctrs., Ltd., 324 N.W.2d 782 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 1009 (1983)
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- United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)
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- People v. Chaitin, 462 N.Y.S.2d 61 (App. Div. 1983), *aff'd*, 460 N.E.2d 1082 (N.Y. 1984)

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- State v. Hughes, 433 So. 2d 88 (La. 1983)
- Ex parte* Hunte, 436 So. 2d 806 (Ala. 1983)
- State v. Beatty, 308 S.E.2d 65 (N.C. Ct. App. 1983)
- Worthington v. United States, 726 F.2d 1089 (6th Cir.), *cert. denied*, 469 U.S. 827 (1984)
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- United States v. Lebovitz, 586 F. Supp. 265 (W.D. Pa.), *aff'd*, 746 F.2d 1468 (3d Cir. 1984)
- People v. Burroughs, 678 P.2d 894 (Cal. 1984)
- United States v. Blanton, 730 F.2d 1425 (11th Cir. 1984)
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- People v. Kendzia, 478 N.Y.S.2d 209 (App. Div. 1984)
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- United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)
- United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)
- United States v. Warren, 747 F.2d 1339 (10th Cir. 1984)
- United States v. Sanders, 749 F.2d 195 (5th Cir. 1984)
- State v. Sway, 472 N.E.2d 1065 (Ohio 1984)
- United States v. Hilliard, 752 F.2d 578 (11th Cir. 1985)
- United States v. Colletta, 602 F. Supp. 1322 (E.D. Pa.), *aff'd*, 770 F.2d 1076 (3d Cir. 1985)
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- United States v. Greber, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 998 (1985)
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- United States v. Sadlier, 649 F. Supp 1560 (D. Mass. 1986)
- United States v. Krowen, 809 F.2d 144 (1st Cir. 1987)
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- United States v. Larm, 824 F.2d 780 (9th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988)
- United States v. Nechy, 827 F.2d 1161 (7th Cir. 1987)
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- People v. Brych, 250 Cal. Rptr. 402 (Ct. App. 1988)
- State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *rev'd in part, aff'd in part*, 574 So. 2d 330 (La. 1990)
- United States v. Goldberg, 862 F.2d 101 (6th Cir. 1988)
- State v. Chenette, 560 A.2d 365 (Vt. 1989)
- United States v. Kats, 871 F.2d 105 (9th Cir. 1989)
- State v. Burnett, 556 A.2d 1251 (N.J. Super. Ct. App. Div. 1989)
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- United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20 (1st Cir. 1989)

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APPENDIX III

CHANGES IN TYPES OF HEALTH CARE PROVIDERS PROSECUTED
SINCE 1970

I. Prosecutions of Medical Doctors

- United States v. Moore, 423 U.S. 122 (1975)
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United States v. Jackson, 761 F.2d 1541 (11th Cir. 1985)
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- United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)
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- United States v. Blanton, 730 F.2d 1425 (11th Cir. 1984)
- Worthington v. United States, 726 F.2d 1089 (6th Cir. 1984), *cert. denied*, 469 U.S. 827 (1984)
- United States v. Strong, 702 F.2d 97 (6th Cir. 1983)
- United States v. Nichols, 695 F.2d 86 (5th Cir. 1982)
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- Aiton v. United States, 3 F.2d 992 (9th Cir. 1925)
- Manning v. United States, 287 F. 800 (8th Cir. 1923)
- Harris v. United States, 273 F. 785 (2d Cir.), *cert. denied*, 257 U.S. 646 (1921)
- Barbot v. United States, 273 F. 919 (4th Cir. 1921)
- Hoyt v. United States, 273 F. 792 (2d Cir. 1921)
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- Trader v. United States, 260 F. 923 (3d Cir.), *cert. denied*, 251 U.S. 555 (1919)
- Thompson v. United States, 258 F. 196 (8th Cir.), *cert. denied*, 251 U.S. 553 (1919)
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- Thurston v. United States, 241 F. 335 (5th Cir.), *cert. denied*, 245 U.S. 646 (1917)
- Hughes v. United States, 231 F. 50 (5th Cir.), *cert. denied*, 242 U.S. 640 (1916)
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- People v. Guagliata, 200 N.E. 169 (Ill.), *cert. denied*, 298 U.S. 667 (1936)
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- People v. Downes, 228 N.W.2d 212 (Mich. 1975)
- People v. Freedland, 444 N.W.2d 250 (Mich. Ct. App. 1989), *cert. denied*, 498 U.S. 853 (1990)
- People v. American Medical Ctrs., Ltd., 324 N.W.2d 782 (Mich. Ct. App.), *cert. denied*, 464 U.S. 1009 (1983)
- People v. Rucker, 329 N.W.2d 510 (Mich. Ct. App. 1982)
- People v. Alford, 251 N.W.2d 314 (Mich. Ct. App. 1977), *aff'd*, 274 N.W.2d 484 (Mich. 1979)
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- People v. Fiedler, 547 N.Y.S.2d 668 (App. Div. 1989)

- People v. Varas, 487 N.Y.S.2d 577 (App. Div. 1985)
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United States v. Sblendorio, 830 F.2d 1362 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988)
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- United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977)
- United States v. Green, 511 F.2d 1062 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
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United States v. Huckaby, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983)

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United States v. Edgewood Health Care Ctr., Inc., 608 F.2d 13 (1st Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980)

United States v. Collins, 596 F.2d 166 (6th Cir. 1979)

United States v. Zacher, 586 F.2d 912 (2d Cir. 1978)

United States v. Nemes, 555 F.2d 51 (2d Cir. 1977)

United States v. Peterson, 488 F.2d 645 (5th Cir. 1974)

United States v. Simon, 510 F. Supp. 232 (E.D. Pa. 1981)

United States v. Braunstein, 474 F. Supp. 1 (D.N.J. 1979)

Frye v. State, 369 So. 2d 892 (Ala. Crim. App. 1979)

McKennie v. State, 439 So. 2d 706 (Ala. Crim. App. 1982), *rev'd*, 439 So. 2d 713 (Ala. 1983)

State v. Lizzi, 508 A.2d 16 (Conn. 1986)

Commonwealth v. Cerveny, 367 N.E.2d 802 (Mass. 1977), *overruled by* Commonwealth v. Crocker, 424 N.E.2d 524 (Mass. 1981)

Commonwealth v. Minkin, 436 N.E.2d 955 (Mass. App. Ct.), *review denied*, 438 N.E.2d 75 (Mass. 1982)

State v. Ruud, 259 N.W.2d 567 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978)

State v. Hoffman, 412 A.2d 120 (N.J. 1980)

State v. Fiorilla, 543 A.2d 958 (N.J. Super. Ct. App. Div. 1988)

State v. Loughrey, 373 A.2d 703 (N.J. Super. Ct. App. Div. 1977)

People v. Warden, 529 N.Y.S.2d 230 (App. Div. 1988)

People v. Notey, 423 N.Y.S.2d 947 (App. Div. 1980)

People v. Severino, 406 N.Y.S.2d 105 (App. Div. 1978)

People v. Wolf, 397 N.Y.S.2d 131 (App. Div. 1977)

People v. Lieberman, 405 N.Y.S.2d 559 (Sup. Ct. 1976)

People v. Christiano, 386 N.Y.S.2d 620 (County Ct. 1976)

IV. Prosecutions of Doctor of Osteopathy

United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1660 (1994)

United States v. Greber, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 998 (1985)

United States v. Warren, 747 F.2d 1339 (10th Cir. 1984)

United States v. Abadi, 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)

United States v. Tapert, 625 F.2d 111 (6th Cir. 1980)
United States v. Adler, 623 F.2d 1287 (8th Cir. 1980)
United States v. Boscia, 573 F.2d 827 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978), *and cert. denied*, 439 U.S. 854 (1978)
United States v. Fellman, 549 F.2d 181 (10th Cir. 1977)
United States v. Radetsky, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 994 (10th Cir. 1990)
United States v. Cacioppo, 517 F.2d 22 (8th Cir. 1975)
United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975)
United States v. Russo, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974)
McBride v. United States, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956)
United States v. Colletta, 602 F. Supp. 1322 (E.D. Pa.), *aff'd*, 770 F.2d 1076 (3d Cir. 1985)
United States v. Weingarden, 468 F. Supp. 410 (E.D. Mich. 1979), *aff'd sub nom. United States v. Tapert*, 625 F.2d 111 (6th Cir.), *cert. denied*, 449 U.S. 952, *and cert. denied*, 449 U.S. 1034 (1980)
State v. MacGillivray, 785 P.2d 59 (Ariz. Ct. App. 1989)
People v. Nunn, 296 P.2d 813 (Cal.), *cert. denied*, 352 U.S. 833 (1956)
People v. Braddock, 264 P.2d 521 (Cal. 1953), *cert. denied*, 348 U.S. 837 (1954)
People v. Rehman, 61 Cal. Rptr. 65 (Ct. App. 1967), *cert. denied*, 390 U.S. 947 (1968)
People v. Schmitt, 317 P.2d 673 (Cal. Ct. App. 1957)
State v. McCarthy, 605 N.E.2d 911 (Ohio 1992)
Commonwealth v. Shelhorse, 381 A.2d 1305 (Pa. Super. Ct. 1977)
State v. Gilmore, 456 P.2d 344 (Wash. 1969)

V. Prosecutions of Medical Clinics

United States v. Romano, 970 F.2d 164 (6th Cir. 1992)
United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 150 (1992)
United States v. Hughes, 895 F.2d 1135 (6th Cir. 1990)
United States v. Kats, 871 F.2d 105 (9th Cir. 1989)
United States v. Sblendorio, 830 F.2d 1362 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988)
United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)
United States v. Miller, 800 F.2d 129 (7th Cir. 1986)
United States v. Vamos, 797 F.2d 1146 (2d Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987)
United States v. Keller, 784 F.2d 1296 (5th Cir. 1986)
United States v. Lipkis, 770 F.2d 1447 (9th Cir. 1985)
United States v. Hilliard, 752 F.2d 578 (11th Cir. 1985)
United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)

- United States v. Beasley, 550 F.2d 261 (5th Cir.), *cert. denied*, 434 U.S. 938 (1977)
- United States v. Maturo, 536 F.2d 427 (D.C. Cir. 1976)
- United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967)
- Moses v. United States, 221 F. 863 (2d Cir.), *cert. denied*, 238 U.S. 629 (1915)
- People v. Marsh, 376 P.2d 300 (Cal. 1962)
- State v. Barrilleaux, 620 So. 2d 1317 (La. 1993)
- People v. American Medical Ctrs., Ltd., 324 N.W.2d 782 (Mich. Ct. App.), *cert. denied*, 464 U.S. 1009 (1983)
- Sherriff v. Spagnola, 706 P.2d 840 (Nev. 1985)
- People v. Weinberg, 586 N.Y.S.2d 132 (App. Div.), *appeal dismissed*, 605 N.E.2d 883 (N.Y. 1992)
- Sorce v. State, 736 S.W.2d 851 (Tex. Crim. App. 1987)

VI. Prosecutions of Chiropractors

- United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987), *cert. denied*, 485 U.S. 907 (1988)
- United States v. Azad, 809 F.2d 291 (6th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987)
- United States v. Krown, 809 F.2d 144 (1st Cir. 1986)
- United States v. Miller, 800 F.2d 129 (7th Cir. 1986)
- United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982)
- United States v. Hancock, 604 F.2d 999 (7th Cir.), *cert. denied*, 444 U.S. 991 (1979)
- United States v. Cady, 567 F.2d 771 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978)
- United States v. DeWelles, 345 F.2d 387 (7th Cir.), *cert. denied*, 382 U.S. 833 (1965)
- United States v. Mitlo, 557 F. Supp. 520 (W.D. Pa.), *rev'd*, 714 F.2d 294 (3d Cir.), *cert. denied*, 464 U.S. 1018 (1983)
- People v. Chatfield, 77 Cal. Rptr. 118 (Ct. App. 1969), *cert. denied*, 402 U.S. 951 (1971)
- People v. Benson, 23 Cal. Rptr. 908 (Ct. App. 1962), *cert. denied*, 374 U.S. 806 (1963), *overruled by* People v. Perez, 401 P.2d 934 (Cal. 1965)
- People v. Schmitt, 317 P.2d 673 (Ct. App. 1957)
- People v. Bovee, 285 N.W.2d 53 (Mich. Ct. App. 1979)
- United States v. Poganski, 257 N.W.2d 578 (Minn. 1977)
- State v. Toscano, 378 A.2d 755 (N.J. 1977)

VII. Prosecutions of Dentists

- United States v. Leichtling, 684 F.2d 553 (8th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983)

- United States v. Furman, 507 F. Supp. 848 (D. Md.), *rev'd*, 672 F.2d 914 (4th Cir. 1981)
United States v. Talbott, 460 F. Supp. 253 (S.D. Ohio), *aff'd*, 590 F.2d 192 (6th Cir. 1978)
People v. Berke, 603 N.E.2d 737 (Ill. App. Ct. 1992).
State v. Hughes, 433 So. 2d 88 (La. 1983)
State v. Fellman, 193 N.W.2d 775 (Neb. 1972)
State v. Burnett, 556 A.2d 1251 (N.J. Super. Ct. App. Div. 1989)
People v. Gelb, 565 N.E.2d 474 (N.Y. 1990)
State v. Page, 232 S.E.2d 460 (N.C. Ct. App. 1977), *review denied*, 235 S.E.2d 64 (N.C. 1977)
Commonwealth v. Nesbit, 575 A.2d 633 (Pa. Super. Ct. 1990), *cert. denied*, 500 U.S. 927 (1991)
Commonwealth v. Wu, 494 A.2d 7 (Pa. Super. Ct. 1985)
State v. Young, 406 S.E.2d 758 (W. Va. 1991)
State v. DeSmidt, 454 N.W.2d 780 (Wis. 1990)

VIII. Prosecutions of Podiatrists

- United States v. Varoz, 740 F.2d 772 (10th Cir. 1984)
United States v. Gordon, 548 F.2d 743 (8th Cir. 1977)
United States v. Rousseau, 534 F.2d 584 (5th Cir. 1976)
United States v. Holt, 529 F.2d 981 (4th Cir. 1975)
United States v. Carey, 475 F.2d 1019 (9th Cir. 1973)
People v. Perry, 605 N.Y.S.2d 790 (App. Div. 1993)
People v. Rosich, 567 N.Y.S.2d 749 (App. Div.), *appeal denied*, 575 N.E.2d 412 (N.Y. 1991)
People v. Weinfeld, 410 N.Y.S.2d 472 (App. Div. 1978)
Commonwealth v. Stein, 546 A.2d 36 (Pa. Super. Ct. 1987), *cert. denied*, 490 U.S. 1046 (1989)

IX. Prosecutions of Medical Laboratories

- United States v. Universal Trade & Indus., Inc., 695 F.2d 1151 (9th Cir. 1983).
United States v. Stewart Clinical Lab., 652 F.2d 804 (9th Cir. 1981)
United States v. Duz-Mor, 650 F.2d 223 (9th Cir. 1981)
United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 44 U.S. 1031 (1980)
United States v. Precision Medical Lab., Inc., 593 F.2d 434 (2d Cir. 1978)
United States v. Porter, 591 F.2d 1048 (5th Cir. 1979)
United States v. Halper, 590 F.2d 422 (2d Cir. 1978)
United States v. Winkle, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 837 (1979)
United States v. Wilson, 490 F. Supp. 713 (E.D. Mich. 1980), *aff'd*, 639 F.2d 314 (6th Cir. 1981)

X. Prosecutions of Hospitals

United States v. Cella, 568 F.2d 1266 (9th Cir. 1977)

United States v. Smith, 523 F.2d 771 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976)

Baker v. United States, 115 F.2d 533 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941)

People v. Rehman, 61 Cal. Rptr. 65 (Ct. App. 1967), *cert. denied*, 390 U.S. 947 (1968)

People v. Forhman, 443 N.Y.S.2d 881 (App. Div. 1981)

XI. Prosecutions of Psychologists

United States v. Marrero, 904 F.2d 251 (5th Cir.), *cert. denied*, 498 U.S. 1000 (1990)

United States v. Cegelka, 853 F.2d 627 (8th Cir.), *cert. denied*, 488 U.S. 1011 (1988)

People v. Eckley, 108 Cal. Rptr. 52 (Ct. App. 1973)

State v. Sword, 713 P.2d 432 (Haw. 1986)

XII. Prosecutions of Durable Medical Equipment Companies

United States v. Weiss, 914 F.2d 1514 (2d Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991)

United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980)

United States v. Evans, 559 F.2d 244 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015, *and cert. denied*, 435 U.S. 945 (1978)

United States v. Hughes, 823 F. Supp. 593 (N.D. Ind. 1993)

XIII. Prosecutions of Ambulance Companies

United States v. Lennartz, 948 F.2d 363 (7th Cir. 1991)

United States v. Bay State Ambulance & Hosp. Rental Svc., 874 F.2d 20 (1st Cir. 1989)

Smith v. Superior Court, 85 Cal. Rptr. 208 (Cal. 1970)

APPENDIX IV

TYPES AND FREQUENCY OF EVIDENCE USED IN REPORTED
PROSECUTIONS OF HEALTH CARE PROVIDERS

I. Cases Relying on Evidence Provided by Insiders

- United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1660 (1994)
- United States v. Romano, 970 F.2d 164 (6th Cir. 1992)
- United States v. Morris, 957 F.2d 1391 (7th Cir.), *cert. denied*, 113 S. Ct. 380 (1992)
- United States v. Lennartz, 948 F.2d 363 (7th Cir. 1991)
- United States v. Nazon, 940 F.2d 255 (7th Cir. 1991)
- United States v. Dino, 919 F.2d 72 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 50 (1991)
- United States v. Kats, 871 F.2d 105 (9th Cir. 1989)
- United States v. Miller, 800 F.2d 129 (7th Cir. 1986)
- United States v. Vamos, 797 F.2d 1146 (2d Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987)
- United States v. Lipkis, 770 F.2d 1447 (9th Cir. 1985)
- United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)
- United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)
- United States v. Huckaby, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983)
- United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982)
- United States v. Tager, 638 F.2d 167 (10th Cir. 1980)
- United States v. Tapert, 625 F.2d 111 (6th Cir. 1980)
- United States v. Witschner, 624 F.2d 840 (8th Cir.), *cert. denied*, 449 U.S. 994 (1980)
- United States v. Abrams, 615 F.2d 541 (1st Cir. 1980)
- United States v. Rogers, 609 F.2d 834 (5th Cir. 1980)
- United States v. Zicree, 605 F.2d 1381 (5th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980)
- United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980)
- United States v. Schaffer, 600 F.2d 1120 (5th Cir. 1979)
- United States v. Jones, 587 F.2d 802 (5th Cir. 1979)
- United States v. Del Valle, 587 F.2d 699 (5th Cir.), *cert. denied*, 442 U.S. 909 (1979)
- United States v. Precision Medical Lab., Inc., 593 F.2d 434 (2d Cir. 1978)
- United States v. Reamer, 589 F.2d 769 (4th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979)
- United States v. Herberman, 583 F.2d 222 (5th Cir. 1978)
- United States v. Cella, 568 F.2d 1266 (9th Cir. 1977)

- United States v. Cady, 567 F.2d 771 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978)
- United States v. Reicin, 497 F.2d 563 (7th Cir.), *cert. denied*, 419 U.S. 996 (1974)
- United States v. Silvern, 494 F.2d 355 (7th Cir. 1973)
- United States v. Perez, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974)
- United States v. Matanky, 482 F.2d 1319 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973)
- United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972)
- United States v. Katz, 455 F.2d 496 (5th Cir.), *cert. denied*, 408 U.S. 923 (1972)
- United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967)
- United States v. Brandenburg, 155 F.2d 110 (3d Cir. 1946)
- United States v. Lebovitz, 586 F. Supp. 265 (W.D. Pa.), *aff'd*, 746 F.2d 1468 (3d Cir. 1984)
- United States v. Mitlo, 557 F. Supp. 520 (W.D. Pa.), *rev'd*, 714 F.2d 294 (3d Cir.), *cert. denied*, 464 U.S. 1018 (1983)
- United States v. Talbott, 460 F. Supp. 253 (S.D. Ohio), *aff'd*, 590 F.2d 192 (6th Cir. 1978)
- Frye v. State, 369 So. 2d 892 (Ala. Crim. App. 1979)
- People v. Thayer, 408 P.2d 108 (Cal. 1965), *cert. denied*, 384 U.S. 908 (1966)
- People v. Scofield, 95 Cal. Rptr. 405 (Ct. App. 1971)
- People v. Rehman, 61 Cal. Rptr. 65 (Ct. App. 1967), *cert. denied*, 390 U.S. 947 (1968)
- State v. Lizzi, 508 A.2d 16 (Conn. 1986)
- People v. Bynum, 557 N.E.2d 238 (Ill. App. Ct. 1990)
- People v. Einstein, 435 N.E.2d 1257 (Ill. App. Ct. 1982)
- State v. Griffon, 448 So. 2d 1287 (La. 1984)
- State v. Heath, 513 So. 2d 493 (La. Ct. App. 1987)
- State v. Cargille, 507 So. 2d 1254 (La. Ct. App. 1987)
- In re Wayne County Prosecutor*, 329 N.W.2d 510 (Mich. Ct. App. 1982)
- State v. Beatty, 308 S.E.2d 65 (N.C. Ct. App. 1983)
- Commonwealth v. Johnson, 167 A. 344 (Pa. 1933)
- State v. Dorn, 496 A.2d 451 (Vt. 1985)
- State v. Quinn, 719 P.2d 936 (Wash. Ct. App. 1986)
- State v. DeSmidt, 454 N.W.2d 780 (Wis. 1990)

II. Cases Relying on Evidence Provided in Documents

- United States v. Duncan, 919 F.2d 981 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991)
- United States v. Larm, 824 F.2d 780 (9th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988)

- United States v. Vamos, 797 F.2d 1146 (2d Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987)
- United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)
- United States v. Huckaby, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983)
- United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982)
- United States v. Abrams, 615 F.2d 541 (1st Cir. 1980)
- United States v. Jones, 587 F.2d 802 (5th Cir. 1979)
- United States v. Winkle, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)
- United States v. Kirk, 584 F.2d 773 (6th Cir.), *cert. denied*, 439 U.S. 1048 (1978)
- United States v. Cella, 568 F.2d 1266 (9th Cir. 1977)
- United States v. Vecchiarello, 536 F.2d 420 (D.C. Cir. 1976)
- United States v. Radetsky, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 944 (10th Cir. 1990)
- United States v. Rosenberg, 515 F.2d 190 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
- United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975)
- United States v. Katz, 455 F.2d 496 (5th Cir.), *cert. denied*, 408 U.S. 923 (1972)
- United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967)
- Neill v. United States, 225 F.2d 174 (8th Cir. 1955)
- United States v. Lee, 107 F.2d 522 (7th Cir. 1939), *cert. denied*, 309 U.S. 659 (1940)
- Heller v. United States, 104 F.2d 446 (4th Cir. 1939)
- Stunz v. United States, 27 F.2d 575 (8th Cir. 1928)
- United States v. Lebovitz, 586 F. Supp. 265 (W.D. Pa.), *aff'd*, 746 F.2d 1568 (3d Cir. 1984)
- Smith v. Superior Court, 85 Cal. Rptr. 208 (Cal. 1970)
- People v. Slocum, 125 Cal. Rptr. 442 (Ct. App. 1975), *cert. denied*, 426 U.S. 924 (1976)
- People v. Berke, 603 N.E.2d 737 (Ill. App. Ct. 1992)
- People v. Einstein, 435 N.E.2d 1257 (Ill. App. Ct. 1982)
- State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *rev'd in part, aff'd in part*, 574 So. 2d 330 (La. 1990)
- State v. Poganski, 257 N.W.2d 578 (Minn. 1977)
- State v. Hermsdorf, 605 A.2d 1045 (N.H. 1992)
- State v. Carr, 626 P.2d 292 (N.M. Ct. App.), *cert. denied*, 625 P.2d 1186 (N.M.), *cert. denied*, 454 U.S. 853 (1981), *overruled by* 879 P.2d 92 (N.M. Ct. App. 1994)
- People v. Weinberg, 586 N.Y.S.2d 132 (App. Div.), *appeal dismissed*, 605 N.E.2d 883 (N.Y. 1992)
- People v. Alizadeh, 452 N.Y.S.2d 425 (App. Div. 1982)

Commonwealth v. Stein, 546 A.2d 36 (Pa. Super. Ct. 1988), *cert. denied*, 490 U.S. 1046 (1989)

State v. Marshall, 606 P.2d 278 (Wash. Ct. App. 1980)

State v. DeSmidt, 454 N.W.2d 780 (Wis. 1990)

III. Cases Relying on Evidence Provided by Medical Experts

Boyd v. United States, 271 U.S. 104 (1926)

United States v. Dino, 919 F.2d 72 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 50 (1991)

United States v. Hughes, 895 F.2d 1135 (6th Cir. 1990)

United States v. Kaplan, 895 F.2d 618 (9th Cir. 1990)

United States v. Campbell, 845 F.2d 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988)

United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)

United States v. Huckaby, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983)

United States v. Rogers, 609 F.2d 834 (5th Cir. 1980)

United States v. Smurthwaite, 590 F.2d 889 (10th Cir. 1979)

United States v. Kirk, 584 F.2d 773 (6th Cir.), *cert. denied*, 439 U.S. 1048 (1978)

United States v. Gordon, 548 F.2d 743 (8th Cir. 1977)

United States v. Rousseau, 534 F.2d 584 (5th Cir. 1976)

United States v. Reicin, 497 F.2d 563 (7th Cir.), *cert. denied*, 419 U.S. 996 (1974)

United States v. Barte, 479 F.2d 484 (10th Cir. 1973)

United States v. Warren, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972)

White v. United States, 399 F.2d 813 (8th Cir. 1968)

United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967)

McBride v. United States, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956)

Nigro v. United States, 117 F.2d 624 (8th Cir. 1941)

Baker v. United States, 115 F.2d 533 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941)

United States v. Lee, 107 F.2d 522 (7th Cir. 1939), *cert. denied*, 309 U.S. 659 (1940)

Heller v. United States, 104 F.2d 446 (4th Cir. 1939)

Barnhill v. United States, 96 F.2d 116 (10th Cir. 1938)

Strader v. United States, 72 F.2d 589 (10th Cir. 1934)

West v. United States, 68 F.2d 96 (10th Cir. 1933)

Stunz v. United States, 27 F.2d 575 (8th Cir. 1928)

Thompson v. United States, 258 F. 196 (8th Cir.), *cert. denied*, 251 U.S. 553 (1919)

Melanson v. United States, 256 F. 783 (5th Cir. 1919)

- Moses v. United States, 221 F. 863 (2d Cir.), *cert. denied*, 238 U.S. 629 (1915)
- Bruce v. United States, 202 F. 98 (8th Cir. 1912)
- Hibbard v. United States, 172 F. 66 (7th Cir. 1909)
- United States v. Talbott, 460 F. Supp. 253 (S.D. Ohio), *aff'd*, 590 F.2d 192 (6th Cir. 1978)
- People v. Marsh, 376 P.2d 300 (Cal. 1962)
- People v. Lonergan, 267 Cal. Rptr. 887 (Ct. App. 1990)
- People v. Brych, 250 Cal. Rptr. 402 (Ct. App. 1988)
- United States v. Privitera, 141 Cal. Rptr. 764 (Ct. App. 1977), *vacated*, 591 P.2d 919 (Cal.), *cert. denied*, 444 U.S. 949 (1979)
- People v. Slocum, 125 Cal. Rptr. 442 (Ct. App. 1975), *cert. denied*, 426 U.S. 924 (1976)
- People v. Rehman, 61 Cal. Rptr. 65 (Ct. App. 1967), *cert. denied*, 390 U.S. 947 (1968)
- People v. Lawrence, 18 Cal. Rptr. 196 (Ct. App. 1961)
- People v. Schmitt, 317 P.2d 673 (Ct. App. 1957)
- People v. Guaglita, 200 N.E. 169 (Ill.), *cert. denied*, 298 U.S. 667 (1936)
- People v. Berke, 603 N.E.2d 737 (Ill. App. Ct. 1992)
- State v. Heath, 513 So. 2d 493 (La. Ct. App. 1987)
- In re* Wayne County Prosecutor, 329 N.W.2d 510 (Mich. Ct. App. 1982)
- State v. Vaccaro, 361 A.2d 47 (N.J. Super. Ct. App. Div.), *cert. denied*, 366 A.2d 674 (N.J. 1976)
- People v. Weinfeld, 410 N.Y.S.2d 472 (App. Div. 1978)
- Commonwealth v. Wu, 494 A.2d 7 (Pa. Super. Ct. 1985)
- State v. Lawrence, 212 S.E.2d 52 (S.C. 1974), *cert. denied*, 422 U.S. 1025 (1975)

IV. Cases Relying on Evidence Provided by Undercover Agents

- United States v. Kaplan, 895 F.2d 618 (9th Cir. 1990)
- United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)
- United States v. Krebs, 788 F.2d 1166 (6th Cir.), *cert. denied*, 479 U.S. 930 (1986)
- United States v. Keller, 784 F.2d 1296 (5th Cir. 1986)
- United States v. Brown, 763 F.2d 984 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985)
- United States v. Warren, 747 F.2d 1339 (10th Cir. 1984)
- United States v. Gamble, 737 F.2d 853 (10th Cir. 1984)
- United States v. Universal Trade & Indus., Inc., 695 F.2d 1151 (9th Cir. 1983)
- United States v. Stewart Clinical Lab., Inc., 652 F.2d 804 (9th Cir. 1981)
- United States v. Rogers, 609 F.2d 834 (5th Cir. 1980)
- United States v. Smurthwaite, 590 F.2d 889 (10th Cir. 1979)

- United States v. Kirk, 584 F.2d 773 (6th Cir.), *cert. denied*, 439 U.S. 1048 (1978)
- United States v. Roy, 574 F.2d 386 (7th Cir.), *cert. denied*, 439 U.S. 1048 (1978)
- United States v. Fellman, 549 F.2d 181 (10th Cir. 1977)
- United States v. Carroll, 518 F.2d 187 (6th Cir. 1975)
- United States v. Rosenberg, 515 F.2d 190 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
- United States v. Green, 511 F.2d 1062 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975)
- United States v. Larson, 507 F.2d 385 (9th Cir. 1974)
- United States v. Badia, 490 F.2d 296 (1st Cir. 1973)
- United States v. Jobe, 487 F.2d 268 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974)
- United States v. Bartee, 479 F.2d 484 (10th Cir. 1973)
- United States v. Warren, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972)
- McBride v. United States, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956)
- Neill v. United States, 225 F.2d 174 (8th Cir. 1955)
- United States v. Abdallah, 149 F.2d 219 (2d Cir.), *cert. denied*, 326 U.S. 724 (1945)
- Barnhill v. United States, 96 F.2d 116 (10th Cir. 1938)
- Towbin v. United States, 93 F.2d 861 (10th Cir. 1938)
- MacLafferty v. United States, 77 F.2d 715 (9th Cir. 1935)
- Rothman v. United States, 270 F. 31 (2d Cir.), *cert. denied*, 254 U.S. 652 (1920)
- Hughes v. United States, 231 F. 50 (5th Cir.), *cert. denied*, 242 U.S. 640 (1916)
- United States v. Perez-Reyes, 754 F. Supp. 637 (N.D. Ill. 1991)
- United States v. Sugar, 606 F. Supp. 1134 (S.D.N.Y. 1985)
- People v. Nunn, 296 P.2d 813 (Cal.), *cert. denied*, 352 U.S. 833 (1956)
- People v. Braddock, 264 P.2d 521 (Cal. 1953), *cert. denied*, 348 U.S. 837 (1954)
- People v. Gandotra, 14 Cal. Rptr. 2d 896 (Ct. App. 1992)
- People v. Brych, 250 Cal. Rptr. 402 (Ct. App. 1988)
- People v. Benson, 23 Cal. Rptr. 908 (Ct. App. 1962), *cert. denied*, 374 U.S. 806 (1963), *overruled by* People v. Perez, 401 P.2d 934 (Cal. 1965)
- Smith v. State, 13 N.E.2d 562 (Ind. 1938)
- State v. Webb, 156 N.W.2d 299 (Iowa 1968)
- State v. Klingenstein, 608 A.2d 792 (Md. 1992), *aff'd in part, rev'd in part*, 624 A.2d 532 (Md. 1992), *cert. denied*, 114 S. Ct. 312 (1993)
- People v. Alford, 251 N.W.2d 314 (Mich. Ct. App. 1977), *aff'd*, 274 N.W.2d 484 (Mich. 1979)

- State v. Olkon, 299 N.W.2d 89 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981)
People v. Varas, 487 N.Y.S.2d 577 (App. Div. 1985)
Sorce v. State, 736 S.W.2d 851 (Tex. Crim. App. 1987)
Haney v. State, 544 S.W.2d 384 (Tex. Crim. App. 1976)
State v. Hoffman, 558 P.2d 602 (Utah 1976)
State v. Venman, 564 A.2d 574 (Vt. 1989)

V. Cases Relying on Evidence Provided by Extrinsic Acts

- United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1660 (1994)
United States v. Neely, 980 F.2d 1074 (7th Cir. 1992)
United States v. Giannattasio, 979 F.2d 98 (7th Cir. 1992)
United States v. Lennartz, 948 F.2d 363 (7th Cir. 1991)
United States v. Hooshmand, 931 F.2d 725 (11th Cir. 1991)
United States v. Marrero, 904 F.2d 251 (5th Cir.), *cert. denied*, 498 U.S. 1000 (1990)
United States v. Campbell, 845 F.2d 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988)
United States v. Norris, 780 F.2d 1207 (5th Cir. 1986)
United States v. Jackson, 761 F.2d 1541 (11th Cir. 1985)
United States v. Blanton, 730 F.2d 1425 (11th Cir. 1984)
United States v. Huckaby, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983)
United States v. Sherer, 653 F.2d 334 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981)
United States v. Witschner, 624 F.2d 840 (8th Cir.), *cert. denied*, 449 U.S. 994 (1980)
United States v. Halper, 590 F.2d 422 (2d Cir. 1978)
United States v. Fellman, 549 F.2d 181 (10th Cir. 1977)
Neill v. United States, 225 F.2d 174 (8th Cir. 1955)
Lambert v. United States, 101 F.2d 960 (5th Cir. 1939)
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Manning v. United States, 287 F. 800 (8th Cir. 1923)
Dyar v. United States, 186 F. 614 (5th Cir. 1911)
State v. Jacobs, 503 P.2d 826 (Ariz. Ct. App. 1972)
State v. Lizzi, 508 A.2d 16 (Conn. 1986)
State v. Griffon, 448 So. 2d 1287 (La. 1984)
State v. McDermitt, 406 So. 2d 195 (La. 1981)
State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *rev'd in part, aff'd in part*, 574 So. 2d 330 (La. 1990)
State v. Carr, 626 P.2d 292 (N.M. Ct. App.), *cert. denied*, 625 P.2d 1186 (N.M.), *cert. denied*, 454 U.S. 853 (1981), *overruled by* 879 P.2d 92 (N.M. Ct. App. 1994)
State v. Beatty, 308 S.E.2d 65 (N.C. Ct. App. 1983)

Commonwealth v. Askin, 452 A.2d 851 (Pa. Super. Ct. 1982), *modified*, 467 A.2d 820 (Pa. 1983)

State v. Lawrence, 212 S.E.2d 52 (S.C. 1974), *cert. denied*, 422 U.S. 1025 (1975)

State v. Chenette, 560 A.2d 365 (Vt. 1989)

State v. Young, 406 S.E.2d 758 (W. Va. 1991)

VI. Cases Relying on Evidence Provided by Patients

United States v. Hooshmand, 931 F.2d 725 (11th Cir. 1991)

United States v. Campbell, 845 F.2d 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988)

United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987), *cert. denied*, 485 U.S. 907 (1988)

United States v. Krowen, 809 F.2d 144 (1st Cir. 1986)

United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)

United States v. Keller, 784 F.2d 1296 (5th Cir. 1986)

United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)

United States v. Witschner, 624 F.2d 840 (8th Cir.), *cert. denied*, 449 U.S. 994 (1980)

United States v. Adler, 623 F.2d 1287 (8th Cir. 1980)

United States v. Kirk, 584 F.2d 773 (6th Cir.), *cert. denied*, 439 U.S. 1048 (1978)

United States v. Herberman, 583 F.2d 222 (5th Cir. 1978)

United States v. Holt, 529 F.2d 981 (4th Cir. 1975)

United States v. Larson, 507 F.2d 385 (9th Cir. 1974)

United States v. Silvern, 494 F.2d 355 (7th Cir. 1973)

United States v. Katz, 455 F.2d 496 (5th Cir.), *cert. denied*, 408 U.S. 923 (1972)

United States v. Sternback, 402 F.2d 353 (7th Cir. 1968), *cert. denied*, 393 U.S. 1082 (1969)

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Hoyt v. United States, 273 F. 792 (2d Cir. 1921)

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Moses v. United States, 221 F. 863 (2d Cir.), *cert. denied*, 238 U.S. 629 (1915)

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United States v. Talbott, 460 F. Supp. 253 (S.D. Ohio), *aff'd*, 590 F.2d 192 (6th Cir. 1978)

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State v. McDermitt, 406 So. 2d 195 (La. 1981)
State v. Heath, 513 So. 2d 493 (La. Ct. App. 1987)
People v. American Medical Ctrs., Ltd., Inc., 324 N.W.2d 782 (Mich. Ct. App.), *cert. denied*, 464 U.S. 1009 (1983)
State v. Bridges, 398 S.W.2d 1 (Mo. 1966)
People v. Chaitin, 462 N.Y.S.2d 61 (App. Div. 1983), *aff'd*, 460 N.E.2d 1082 (N.Y. 1984)
People v. Montesano, 446 N.Y.S.2d 813 (App. Div. 1982)
Commonwealth v. Wu, 494 A.2d 7 (Pa. Super. Ct. 1985)
State v. Gilmore, 456 P.2d 344 (Wa. 1969)
State v. Kennedy, 314 N.W.2d 884 (Wis. Ct. App. 1981)
State v. Young, 406 S.E.2d 758 (W. Va. 1991)

VII. Cases Relying on Evidence Provided by Computer Data

United States v. Neely, 980 F.2d 1074 (7th Cir. 1992)
United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987), *cert. denied*, 485 U.S. 907 (1988)
United States v. Krowen, 809 F.2d 144 (1st Cir. 1987)
United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)
United States v. Krebs, 788 F.2d 116 (6th Cir.), *cert. denied*, 479 U.S. 930 (1986)
United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)
United States v. Sanders, 749 F.2d 195 (5th Cir. 1984)
United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)
United States v. Nichols, 695 F.2d 86 (5th Cir. 1982)
United States v. Dumas, 688 F.2d 84 (10th Cir. 1982)
United States v. Johnson, 634 F.2d 735 (4th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)
United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980)
United States v. Halper, 590 F.2d 422 (2d Cir. 1978)
United States v. Kirk, 584 F.2d 773 (6th Cir.), *cert. denied*, 439 U.S. 1048 (1978)
United States v. Peterson, 488 F.2d 645 (5th Cir. 1974)
United States v. Silvern, 494 F.2d 355 (7th Cir. 1973)
United States v. Russo, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974)
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United States v. Wilson, 490 F. Supp. 713 (E.D. Mich. 1980), *aff'd*, 639 F.2d 314 (6th Cir. 1981)

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People v. Louie, 205 Cal. Rptr. 247 (App. Dep't Super. Ct. 1984)
State v. Griffon, 448 So. 2d 1287 (La. 1984)
People v. American Medical Ctrs., Ltd. Inc., 324 N.W.2d 782 (Mich. Ct. App.), *cert. denied*, 464 U.S. 1009 (1983)
State v. Fellman, 193 N.W.2d 775 (Neb. 1972)
Sherriff v. Spagnola, 706 P.2d 840 (Nev. 1985)
People v. Perry, 605 N.Y.S.2d 790 (App. Div. 1993)
People v. Weinberg, 586 N.Y.S.2d 132 (App. Div.), *appeal dismissed*, 605 N.E.2d 883 (N.Y. 1992)
State v. Vogel song, 612 N.E.2d 462 (Ohio Ct. App. 1992)
State v. Venman, 564 A.2d 574 (Vt. 1989)
State v. Chenette, 560 A.2d 365 (Vt. 1989)
State v. Dorn, 496 A.2d 451 (Vt. 1985)

VIII. Cases Relying on Evidence Provided by Billing Experts

United States v. Morris, 957 F.2d 1391 (7th Cir.), *cert. denied*, 113 S. Ct. 380 (1992)
United States v. Siddiqi, 959 F.2d 1167 (2d Cir. 1992)
United States v. Hooshmand, 931 F.2d 725 (11th Cir. 1991)
United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)
United States v. Varoz, 740 F.2d 772 (10th Cir. 1984)
United States v. Collins, 596 F.2d 166 (6th Cir. 1979)
United States v. Zacher, 586 F.2d 912 (2d Cir. 1978)
United States v. Fellman, 549 F.2d 181 (10th Cir. 1977)
United States v. Radetsky, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 994 (10th Cir. 1990)
United States v. Reicin, 497 F.2d 563 (7th Cir.), *cert. denied*, 419 U.S. 996 (1974)
McKennie v. State, 439 So. 2d 706 (Ala. Crim. App. 1982), *rev'd*, 439 So. 2d 713 (Ala. 1983)
People v. Einstein, 435 N.E.2d 1257 (Ill. App. Ct. 1982)
State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *rev'd in part, aff'd in part*, 574 So. 2d 330 (La. 1990)
State v. Cargille, 507 So. 2d 1254 (La. Ct. App. 1987)
State v. Ruud, 259 N.W.2d 567 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978)
Sherriff v. Spagnola, 706 P.2d 840 (Nev. 1985)
People v. Weinberg, 586 N.Y.S.2d 132 (App. Div.), *appeal dismissed*, 605 N.E.2d 883 (N.Y. 1992)
People v. Montesano, 446 N.Y.S.2d 813 (App. Div. 1982)

IX. Cases Relying on Evidence Provided in Provider Manuals

United States v. Hooshmand, 931 F.2d 725 (11th 1991)

- United States v. Kline, 922 F.2d 610 (10th Cir. 1990)
United States v. Alemany Rivera, 781 F.2d 229 (1st Cir. 1985), *cert. denied*, 475 U.S. 1086 (1986)
United States v. Brown, 763 F.2d 984 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985)
United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)
United States v. Radetsky, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 994 (10th Cir. 1990)
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State v. Greco, 148 A.2d 164 (N.J. 1959)

X. Cases Relying on Evidence Provided in Summaries

- United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1660 (1994)
United States v. Duncan, 919 F.2d 981 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991)
United States v. Campbell, 845 F.2d 1374 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988)
United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985)
United States v. Behrens, 689 F.2d 154 (10th Cir.), *cert. denied*, 459 U.S. 1088 (1982)
United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980)
Moses v. United States, 221 F. 863 (2d Cir.), *cert. denied*, 238 U.S. 629 (1915)
United States v. Mitlo, 557 F. Supp. 520 (W.D. Pa.), *rev'd*, 714 F.2d 294 (3d Cir.), *cert. denied*, 464 U.S. 1018 (1983)
Commonwealth v. Minkin, 436 N.E.2d 955 (Mass. App. Ct.), *review denied*, 438 N.E.2d 75 (Mass. 1982)
Sorce v. State, 736 S.W.2d 851 (Tex. Crim. App. 1987)
State v. Marshall, 606 P.2d 278 (Wash. Ct. App. 1980)

APPENDIX V

CASES RESOLVED IN FAVOR OF DEFENDANTS ON PROCEDURAL
AND EVIDENTIARY GROUNDSI. Health Care Prosecutions Resolved in Favor of the Defendant
at the Pretrial Stage

- United States v. Levin, 973 F.2d 463 (6th Cir. 1992)
United States v. Tager, 638 F.2d 167 (10th Cir. 1980)
United States v. Abrams, 615 F.2d 541 (1st Cir. 1980)
Aiton v. United States, 3 F.2d 992 (9th Cir. 1925)
United States v. Lott, 630 F. Supp. 611 (E.D. Va.), *aff'd*, 795 F.2d 82
(4th Cir. 1986)
United States v. Colletta, 604 F. Supp. 1322 (E.D. Pa.), *aff'd*, 770 F.2d
1076 (3d Cir. 1985)
United States v. Mitlo, 557 F. Supp. 520 (W.D. Pa.), *rev'd*, 714 F.2d
294 (3d Cir.), *cert. denied*, 464 U.S. 1018 (1983)
Ex parte Hunte, 436 So. 2d 806 (Ala. 1983)
State v. Barber, 388 S.E.2d 350 (Ga. Ct. App. 1989)
Sherriff v. Spagnola, 706 P.2d 840 (Nev. 1985)
People v. Lieberman, 405 N.Y.S.2d 559 (Sup. Ct. 1976)
People v. Reitman, 492 N.Y.S.2d 324 (County Ct. 1985)
State v. Fiorilla, 543 A.2d 958 (N.J. Super. Ct. App. Div. 1988)
Commonwealth v. Slaton, 608 A.2d 5 (Pa. 1992)
Commonwealth v. Litman, 144 A.2d 592 (Pa. 1958)

II. Health Care Prosecutions Resolved in the Defendant's Favor
by Post-Trial Resolutions

- Linder v. United States, 268 U.S. 5 (1925)
United States v. Romano, 970 F.2d 164 (6th Cir. 1992)
United States v. Mayers, 957 F.2d 858 (11th Cir. 1992)
United States v. Allard, 926 F.2d 1237 (1st Cir. 1991)
United States v. Kline, 922 F.2d 610 (10th Cir. 1990)
United States v. Goldberg, 862 F.2d 101 (6th Cir. 1988)
United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986)
United States v. Brown, 763 F.2d 984 (8th Cir.), *cert. denied*, 474 U.S.
905 (1985)
United States v. Hilliard, 752 F.2d 578 (11th Cir. 1985)
United States v. Varoz, 740 F.2d 772 (10th Cir. 1984)
United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)
United States v. Dumas, 688 F.2d 84 (10th Cir. 1982)
United States v. Goldstein, 695 F.2d 1228 (10th Cir. 1981), *cert. de-
nied*, 462 U.S. 1132 (1983)
United States v. Stewart Clinical Lab., Inc., 652 F.2d 804 (9th Cir.
1981)
United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S.
869 (1980)

- United States v. Porter, 591 F.2d 1048 (5th Cir. 1979)
United States v. Halper, 590 F.2d 422 (2d Cir. 1978)
United States v. Zacher, 586 F.2d 912 (2d Cir. 1978)
United States v. Herberman, 583 F.2d 222 (5th Cir. 1978)
United States v. Nemes, 555 F.2d 51 (2d Cir. 1977)
United States v. Radetsky, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), *overruled by* 921 F.2d 994 (10th Cir. 1990)
United States v. Perkal, 530 F.2d 604 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976)
United States v. Carroll, 518 F.2d 187 (6th Cir. 1975)
United States v. Black, 512 F.2d 864 (9th Cir. 1975)
United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975)
United States v. Larson, 507 F.2d 385 (9th Cir. 1974)
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United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972)
United States v. Shuford, 454 F.2d 772 (4th Cir. 1971)
Neill v. United States, 225 F.2d 174 (8th Cir. 1955)
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Nigro v. United States, 117 F.2d 624 (8th Cir. 1941)
Lambert v. United States, 101 F.2d 960 (5th Cir. 1939)
Towbin v. United States, 93 F.2d 861 (10th Cir. 1938)
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West v. United States, 68 F.2d 96 (10th Cir. 1933)
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Hibbard v. United States, 172 F. 66 (7th Cir. 1909)
United States v. Anthony, 15 F. Supp. 553 (S.D. Cal. 1936)
United States v. Fleming, 251 F. 932 (W.D. Pa. 1918)
State v. MacGillivray, 785 P.2d 59 (Ariz. Ct. App. 1989)
State v. Jacobs, 503 P.2d 826 (Ariz. Ct. App. 1972)
People v. Burroughs, 678 P.2d 894 (Cal. 1984)
People v. Marsh, 376 P.2d 300 (Cal. 1962)
People v. Lonergan, 267 Cal. Rptr. 887 (Ct. App. 1990)
United States v. Privitera, 141 Cal. Rptr. 764 (Ct. App. 1977), *vacated*, 591 P.2d 919 (Cal.), *cert. denied*, 444 U.S. 949 (1979)
People v. Brown, 132 Cal. Rptr. 217 (Ct. App. 1976)
People v. Bowman, 320 P.2d 70 (Cal. Dist. Ct. App. 1958)
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State v. Webb, 156 N.W.2d 299 (Iowa 1968)
State v. Brown, 616 So. 2d 792 (La. Ct. App. 1993)
State v. Heath, 513 So. 2d 493 (La. Ct. App. 1987)
State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *rev'd in part, aff'd in part*, 574 So. 2d 330 (La. 1990)
Commonwealth v. Cerveney, 367 N.E.2d 802 (Mass. 1977), *overruled by* Commonwealth v. Crocker, 424 N.E.2d 524 (Mass. 1981)
Commonwealth v. Minkin, 436 N.E.2d 955 (Mass. App. Ct.), *review denied*, 438 N.E.2d 75 (Mass. 1982)
People v. Downes, 228 N.W.2d 212 (Mich. 1975)
People v. Kayne, 255 N.W. 758 (Mich. 1934)
People v. Bovee, 285 N.W.2d 53 (Mich. Ct. App. 1979)
State v. Toscano, 378 A.2d 755 (N.J. 1977)
State v. Greco, 148 A.2d 164 (N.J. 1959)
State v. Vaccaro, 361 A.2d 47 (N.J. Super. Ct. App. Div.), *cert. denied*, 366 A.2d 674 (N.J. 1976)
People v. Weinberg, 586 N.Y.S.2d 132 (App. Div.), *appeal dismissed*, 605 N.E.2d 883 (N.Y. 1992)
People v. Asar, 523 N.Y.S.2d 910 (App. Div. 1988)
People v. Varas, 487 N.Y.S.2d 577 (App. Div. 1985)
People v. Chaitin, 462 N.Y.S.2d 61 (App. Div. 1983), *aff'd*, 460 N.E.2d 1082 (N.Y. 1984)
People v. Alizadeh, 452 N.Y.S.2d 425 (App. Div. 1982)
People v. Montesano, 446 N.Y.S.2d 813 (App. Div. 1982)
People v. Greenwood, 139 N.Y.S.2d 654 (County Ct.), *aff'd*, 132 N.E.2d 308 (N.Y. 1955)
State v. Best, 233 S.E.2d 544 (N.C. 1977)
State v. Vogelsong, 612 N.E.2d 462 (Ohio Ct. App. 1992)
State v. Williams, 603 N.E.2d 383 (Ohio Ct. App. 1992)
Commonwealth v. Litman, 144 A.2d 592 (Pa. 1958)
Commonwealth v. West, 396 A.2d 380 (Pa. Super. Ct. 1978)
Commonwealth v. Shelhorse, 381 A.2d 1305 (Pa. Super. Ct. 1977)
McLean v. State, 527 S.W.2d 76 (Tenn. 1975)
Haney v. State, 544 S.W.2d 384 (Tex. Crim. App. 1976)
DeVine v. State, 206 S.W.2d 247 (Tex. Crim. App. 1947)
State v. Mark, 618 P.2d 73 (Wash. 1980)
State v. Marshall, 606 P.2d 278 (Wash. Ct. App. 1980)
State v. Young, 406 S.E.2d 758 (W. Va. 1991)

III. Health Care Prosecutions Resolved in Favor of the Defendant
by Obtaining Suppression of Evidence, Dismissal of
Charges or Reversal of the Conviction

- United States v. Levin, 973 F.2d 463 (6th Cir. 1992)
United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)
United States v. Tager, 638 F.2d 167 (10th Cir. 1980)
United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S.
869 (1980)
United States v. Abrams, 615 F.2d 541 (1st Cir. 1980)
Neill v. United States, 225 F.2d 174 (8th Cir. 1955)
Wesson v. United States, 164 F.2d 50 (8th Cir. 1947)
United States v. Brandenburg, 155 F.2d 110 (3d Cir. 1946)
Lambert v. United States, 101 F.2d 960 (5th Cir. 1939)
Towbin v. United States, 93 F.2d 861 (10th Cir. 1938)
MacLafferty v. United States, 77 F.2d 715 (9th Cir. 1935)
Strader v. United States, 72 F.2d 589 (10th Cir. 1934)
Aiton v. United States, 3 F.2d 992 (9th Cir. 1925)
Manning v. United States, 287 F. 800 (8th Cir. 1923)
Dyar v. United States, 186 F. 614 (5th Cir. 1911)
United States v. Lott, 630 F. Supp. 611 (E.D. Va.), *aff'd*, 795 F.2d 82
(4th Cir. 1986)
United States v. Mitlo, 557 F. Supp. 520 (W.D. Pa.), *rev'd*, 714 F.2d
294 (3d Cir.), *cert. denied*, 464 U.S. 108 (1983)
State v. Jacobs, 503 P.2d 826 (Ariz. Ct. App. 1972)
People v. Marsh, 376 P.2d 300 (Cal. 1962)
People v. Bowman, 320 P.2d 70 (Cal. Dist. Ct. App. 1958)
People v. Louie, 205 Cal. Rptr. 247 (App. Dep't Super. Ct. 1984)
State v. Barber, 388 S.E.2d 350 (Ga. Ct. App. 1989), *writ vacated*, 394
S.E.2d 353 (Ga. 1990)
State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *rev'd in part*,
aff'd in part, 574 So. 2d 330 (La. 1990)
Sherriff v. Spagnola, 706 P.2d 840 (Nev. 1985)
State v. Vaccaro, 361 A.2d 47 (N.J. Super. Ct. App. Div.), *cert. denied*,
366 A.2d 674 (N.J. 1976)
People v. Alizadeh, 452 N.Y.S.2d 425 (App. Div. 1982)
People v. Montesano, 446 N.Y.S.2d 813 (App. Div. 1982)
People v. Lieberman, 405 N.Y.S.2d 599 (Sup. Ct. 1976)
People v. Reitman, 492 N.Y.S.2d 324 (County Ct. 1985)
State v. Vogelsong, 612 N.E.2d 462 (Ohio Ct. App. 1992)
Commonwealth v. Litman, 144 A.2d 592 (Pa. 1958)
Commonwealth v. Slaton, 608 A.2d 5 (Pa. 1992)

APPENDIX VI

GROUNDS FOR UNFAVORABLE EVIDENTIARY RULINGS BY
APPELLATE COURTS

I. Improper Admission of Extrinsic Acts

United States v. Fellman, 549 F.2d 181 (10th Cir. 1977)

Neill v. United States, 225 F.2d 174 (8th Cir. 1955)

Lambert v. United States, 101 F.2d 960 (5th Cir. 1939)

MacLafferty v. United States, 77 F.2d 715 (9th Cir. 1935)

Manning v. United States, 287 F. 800 (8th Cir. 1923)

Dyar v. United States, 196 F. 614 (5th Cir. 1911)

State v. Jacobs, 503 P.2d 826 (Ariz. Ct. App. 1972)

People v. Alizadeh, 452 N.Y.S.2d 425 (App. Div. 1982)

II. Improper Admission of Documents

United States v. Brandenburg, 155 F.2d 110 (3d Cir. 1966)

State v. Vogelsong, 612 N.E.2d 462 (Ohio Ct. App. 1992)

State v. Romero, 533 So. 2d 1264 (La. Ct. App. 1988), *aff'd in part*,
rev'd in part, 574 So. 2d 330 (La. 1990)

III. Improper Ruling on Expert Testimony

Strader v. United States, 72 F.2d 589 (10th Cir. 1934)

People v. Montesano, 466 N.Y.S.2d 813 (App. Div. 1982)

IV. Improper Admission of Peer Group Comparison

United States v. Seelig, 622 F.2d 207 (6th Cir.) *cert. denied*, 449 U.S.
869 (1980)

People v. Louie, 205 Cal. Rptr. 247 (App. Dep't Super. Ct. 1984)